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CONVEYANCER'S NOTEBOOK

Local Land Charges—duty of solicitors.—In the *Law Society's Gazette* (Vol. 46, p. 67) it is announced that the Council have considered the duty of a solicitor to make inquiries. The Council feel that no detailed rules as to the duty of a solicitor can be laid down, but, in view of its having become common practice to make some form of inquiries additional to requisitions for certificates of local searches, the Council are of opinion that a purchaser's solicitor should make inquiries of local authorities on the lines of the forms already agreed (*ante*, p. 159). The Council take the view that all reasonable steps should be taken to follow up the results of such inquiries and the client should be informed of any risks he runs.

The position has now become too uncertain for speculation, because this ruling appears to go upon the line that strictly these are not matters of title to investigate. It becomes increasingly difficult to see how they concern the " investigation of title " for which the solicitor is retained and incidentally for which, according to the scale, alone he is paid. There seems to be no justification for this uncertainty. Surely the Law Society has sufficient influence to promote a short bill to clean up these elementary matters. Nevertheless, in the meantime practitioners must make what they can of the guidance offered (and see *ante*, pp. 159–60).

Departmental Committee on Local Land Charges.—The Lord Chancellor has set up a departmental committee under the chairmanship of Sir John Stainton, K.C., to review the position with regard to restrictions and prohibitions imposed by local authorities and government departments. As is well known, the present position is chaotic because no standard method has been employed. The Committee is to consider the desirability of legislation, if necessary.

One of the great difficulties that afflicts the local land charge is that of standardisation both in form and procedure. We find it difficult to see why it should exist as such. If restrictive covenants and such like can appear on the central Land Charges Registry there seems no

reason, except the possible convenience of local authorities, why all such restrictions should not equally appear on the central Registry. It is true that Town Planning Schemes and similar wide scale restrictions would be practically impossible to register, but most of these no longer require registration as a local land charge. The point is that restrictions which apply to specific plots should not be registered as local land charges.

It is thought that the adoption of such a principle would be unwelcome to the Land Registry without substantial change in the present system of registration of land charges, which, in any event, is by no means wholly satisfactory.

There are two reforms which should be simple and effective: (i) registration of a land charge should not be notice of a land charge to a purchaser prior to contract; (ii) a vendor should be under a duty to disclose prior to contract all matters registered as land charges.

This subject, however, is not nearly as simple as that concerned with normal incumbrances. In many cases even if the incumbrance is void against a purchaser for non-registration all the authority concerned would have to do would be to serve a fresh notice, etc. So, for example, if an enforcement notice for planning contravention turned out to be invalid, normally a fresh one could be served unless express provision was made to prevent it and this might defeat planning prospects. The same is even more apparent when it comes to tree preservation orders or orders relating to good estate management under the Agriculture Act.

In our view a different technique is required altogether, if a purchaser is not to be compelled to buy a "pig in a poke". This technique must be the right to call upon the relevant authority to say whether or not the land is to be subjected to any such incumbrance at any rate for a measurable time. We doubt whether our administrators would relish such an interference with their own freedom of action. Shackles are primarily intended for others.

Development charge and contraventions of previous planning control.—Under section 75 of the Town and Country Planning Act, 1947, a contravention of planning control existing on July 1, 1948, is subject to an enforcement notice. Nevertheless, it is possible to apply for retrospective planning permission so that, in fact, the "development" becomes authorised, but this permission may be subject to a limited period, when a fresh permission will be necessary. When the contravention is so authorised and becomes a permitted use no development charge is payable, but this provision of the Act would not seem to cover any renewal of the permission. Nevertheless, the Central Land Board state that if such renewal is granted no development charge will be made. This is, in fact, an important concession in respect of many premises used for purposes not authorised by planning schemes or resolutions during the war.

Abstracting Deeds effecting apportionment of ground rent or rent-charge.—The Council of the Law Society (*Gazette*, Vol. 46, p. 131) express the view that a deed apportioning ground rent or rent charge should be abstracted whether or not it is prior in date to the root of title. Consequently, they recommend the practice that the deed should be executed in duplicate so that both parties may retain a copy.

Official searches of the index map in non-compulsory areas.—The Chief Land Registrar announces that acting under the discretion vested in him by Abatement No. 9 of the Land Registration Fee Order, 1930, he has now remitted the fee prescribed by paragraph XII (6) (a) for an Official Search of the Index Map in non-compulsory areas.

Sale by personal representatives to one of themselves under power in will—stamp.—A subscriber has raised the point whether the powers in a will can be kept off the title by stamping an agreement to sell *ad valorem*, and thus making a simple assent without stamping. In the view taken by the Controller of Stamps this is not possible, because in effect this is not a case to which the ordinary rules concerning stamps on assents apply.

The virtue of the method is plain. If the will is not abstracted and there is no form of stamp duty imposed on the assent a purchaser would get a good title based on section 36 (7) of the Administration of Estates Act, but owing to the decision in *Re Duce and Boot's Cont.*, [1937] Ch. 642, anything unusual, such as a ten shilling stamp, on an assent would presumably put a purchaser on inquiry.

The real difficulty in the proposal lies in the nature of the power to sell. It is peculiarly a matter that has never been adequately straightened out, because the fusion of Law and Equity took place before realty vested in the personal representative. It is generally said that personal representatives have no power to sell to one of their number because they are in a fiduciary position—that is, there is a restraint in equity which would not be effective against a *bona fide* purchaser. Consequently, an express power of sale should operate in equity.

In our view this is not quite correctly stating the position. The power operates in respect of this disposition of the legal estate and does not directly affect the equities at all. It is, in effect, a power to do something otherwise forbidden by law. If this is the correct assumption, then it must be abstracted, and an assent is no more a suitable method of disposition than in the case of a purchaser when the vendor has died between contract and conveyance: see *G. H. R. Co.* v. *I. R. C.*, [1943] 1 K. B. 303. But we are not sure that this is the correct answer. If A and B were executors of C, and A and B purport to convey to B by way of sale, never having taken out Probate but forged a conveyance by C to themselves, would a purchaser from B take a good title? The legal estate was clearly vested in A and B on C's death.

In our view the additional powers of trustees, which include personal representatives, should always form part of the title. This is clear enough in the case of the trust for sale but has been obscured in the case of wills by the existence of the assent. The only cases to which assents would appear to apply are those where a person is entitled " by devise, bequest, devolution, appropriation or otherwise " : A. E. A., s. 36 (1). It would seem that section 36 (7) extends this in favour of a purchaser so that by a legal fiction a purchaser may get a good title where the person is not entitled to the assent. This, however, does not make the assent a proper method of dealing with the matter and furthermore may lead to difficulties between the date of the assent and any subsequent conveyance to a purchaser. We doubt whether a person who takes under a disposition made in respect of an additional power affecting the legal estate can claim to fall within the category of one taking by " devise, bequest, devolution or appropriation ", and " otherwise " would seem to be subject to the *ejusdem generis* rule, which should not include such a case.

Consequently, though not without hesitation, we feel that the Controller of Stamps is correct in refusing to accept the view that an ordinary unstamped assent would be sufficient, if the contract were stamped *ad valorem*.

CAN A TRUSTEE SELL TO HIS WIFE?

By J. G. FLEMING, M.A., D.Phil., Barrister-at-Law

No principle in the law of trusts enjoys greater sanctity than the axiom that a trustee shall not be allowed to take advantage of his fiduciary position so as to benefit himself in dealings with the trust estate. This finds its most emphatic illustration in the determination of the Court to discountenance any transaction, however colourable, whereby the trustee would, either immediately or mediately, acquire the trust property by purchase from himself or his co-trustees. That prohibition, originally laid down by Lord Thurlow in *Fox* v. *Macreth* (1788), 2 Bro. C. C. 440, and elaborated in Lord Eldon's great judgments in *Ex p. Lacey* (1802), 6 Ves. 625, and *Ex p. Bennett* (1805), 10 Ves. 381, is of an absolute nature and not dependent on the existence of special facts showing that the trustee had either used his position in order to secure an advantageous bargain, as, *e.g.*, by purchasing at under-value, or that he had peculiar opportunities of acquiring a knowledge of the value of the property which was not available to the *cestuis que trust* or outsiders. No encroachment on the generality of the rule has been tolerated because the Courts are only too fully conscious of the difficulties inherent in any attempted inquiry into the circumstances of such transactions for the purpose of extracting from the alambric of facts whether the trustee has in truth acted honestly and to the best advantage of the beneficiaries. It will be conducive to a clearer appreciation of the succeeding discussion if it is apprehended at the outset that the rationale of that principle is anchored to an absolute rule of

public policy rather than attributable, as has occasionally been implied, to the technical difficulty of a person giving effect to a transfer of property to himself. Thus the statement by Lindley, L.J., as he then was, in *Farrar* v. *Farrars, Ltd.* (1888), 40 Ch. D. at p. 409, that " a sale by a person to himself is not a sale at all " may be a convenient epitome, but does not elucidate the underlying policy, of the rule. That its basis is more fundamental and its scope considerably wider is demonstrated by a series of decisions which have baulked its evasion by the employment of circuitous or colourable devices. The creative force of equity jurisprudence has prevented a trustee from doing indirectly what he indubitably cannot do directly, and has therefore stigmatised not only sales by a trustee to a third person as agent or trustee on his own behalf (cf. *Farrar* v. *Farrars, Ltd., supra*, at p. 409), but also purchases by a trustee as agent for a third party (*Ex p. Bennett, supra*).

In the light of these preliminary observations, it is proposed to examine the attitude of Courts of equity towards sales of trust property by a trustee to members of his family, more particularly to his wife. Lord Cottenham's admonition in *Ferraby* v. *Hobson* (1847), 2 Phil. 255, 261, is a useful reminder that " trustees expose themselves to great peril in allowing their own relations to intervene in any matter connected with the execution of the trust, for the suspicion which that circumstance is calculated to excite is one which it would require a very strong case to remove ". There, it was actually held that a lease of part of the trust estate by a trustee to his sister, though looked upon with suspicion, cannot be impeached by the beneficiaries on the sole ground that the rent which, at the time of the granting of the lease, was the best available might have been subsequently increased by his giving notice to quit a short time after there appeared a probability that the price of agricultural produce would enable him to obtain a higher rent. Though that decision itself may be regarded as having gone to the verge of the law in putting the most favourable construction on the conduct of the trustee, it is nevertheless clear that the case of letting trust property does not raise the same considerations of policy as a sale and that Lord Cottenham's remarks do not support the inference that a *purchase* from the trustee by his wife or other close relation might be similarly sustained on proof that the transaction satisfied the requirement of *bona fides* and enured for the benefit of the beneficiaries.

No reported English decision appears to have hitherto authoritatively settled the question whether a sale by a trustee to his wife is absolutely prohibited or may be conditionally valid. Nevertheless, on several occasions the Courts have taken the opportunity of pronouncing against the validity of purchases from trustees in bankruptcy by their near relatives. Thus Lord Selborne in *Re Sparks, ex p. Forder*, [1881] W. N. 117, C. A., went out of his way to declare that no such sale could be upheld in favour " of anyone so connected with them as to stand in a position more advantageous than an ordinary purchaser ", but that case was complicated by the additional circumstance that of the two joint purchasers not only was the trustee's son a minor but the other was the former's partner, so that in the last respect alone the transaction fell squarely within a recognised prohibited category. In *Ex p. Moore* (1881), 45 L. T. 558, Bacon, V.-C., disallowed a sale to a trustee's brother notwithstanding the fact that it had been conducted by auction

and the property had thus realised the best price obtainable, but once again the decision is weakened from the point of view now under discussion because the purchaser was also the trustee's partner. All the same, the learned Judge drew attention to the " well-established rule of law that a trustee cannot sell to certain persons—to his son for instance ", and referred specifically to the close relationship between the parties in question (as reported in 30 W. R. 123). Lastly, in *John* v. *Jones* (1876), 34 L. T. 570, Hall, V.-C., set aside a sale by an administratrix to her son and expressed the view that this circumstance was by itself sufficient to invalidate the transaction, although he additionally found that the purchase had been at undervalue.

These decisions are, no doubt, susceptible of elastic interpretation and by no means conclusive on the present issue, but evince a seemingly strong inclination towards unconditionally disallowing sales by trustees to members of their family. There is, however, a notable absence of direct authority on the specific question of sales to wives. It has been suggested that this may be due to the fact that prior to the passing of the Married Women's Property Act of 1882 a married woman would not usually have been capable of entering into such a transaction for want of competence by the general law (see Salmond, J., in *Robertson* v. *Robertson*, [1924] N.Z.L.R. 552, 554), but it could equally —and perhaps with greater assurance—be attributed to the conscious realisation of trustees that such sales would meet with unqualified condemnation if submitted to the scrutiny of the Courts. The leading textbooks, so far as the point is noted at all, appear to be divided on this question. *Underhill* (9th ed., p. 354), after stating the absolute disqualification imposed upon a trustee purchasing from himself, conjectured : " Nor is it apprehended could he sell to his wife or child ", without however being able to adduce any authority for his conclusion. In contrast, in the 14th ed. of *Lewin on Trusts* (p. 827), it is categorically asserted that " there is no absolute rule of law that a purchase of trust property from the trustee by the wife of one of them is illegal, but it is a transaction open to suspicion ". A statement to the same effect is also found in *Halsbury*, Vol. 33, p. 282 n. (*u*). As a preliminary point, the use of the word " illegal " in this context should be eschewed, because it is now well established that such a bargain is, at worst, voidable. A direct purchase by the trustee may, it is true, be set aside against him, but it will stand *vis-à-vis* a subsequent purchaser for value without notice (see *Cookson* v. *Lee* (1853), 23 L. J. Ch. 473), and is in any event capable of ratification or adoption by the beneficiaries (see *Baker* v. *Carter* (1835), 1 Y. & C. 250, 252; *Robertson* v. *Robertson*, *supra*). On the main issue, the authority on which Lewin's proposition claims to rest is the decision on appeal by the Scottish Court of Session in *Burrell* v. *Burrell*, 1915 S. C. 333, where it was held that there existed no such absolute prohibition and that the onus of affirmatively proving the *bona fides* of the sale had in the circumstances been adequately discharged. While we have the assurance of Lord O'Hagan in *Aberdeen Town Council* v. *Aberdeen University* (1877), 2 A. C. 544, 555, that in respect of the misuse of the trustee's fiduciary position Scots jurisprudence may claim to be identical with English law, the cited decision is not particularly helpful because the Court did not, unfortunately, avail itself of the

opportunity of substantiating its conclusion. In the N. S. W. case of *Re Douglas* (1928), 29 S. R. 48, Harvey, C.J., in Equity, unreservedly followed the earlier decision of the Inner House, and additionally relied for support on the following reasons : First, " an absolute prohibition is the proper subject-matter for the Legislature and not for a Court of justice which proceeds on safer lines when it draws no arbitrary rules but deals with each case on its merits ", and, secondly, the reason for the unqualified bar of purchases by trustees themselves rests on the rule that " a contract requires the interplay of two minds. A man cannot contract with himself, and it follows that he cannot contract with an agent acting for himself because *qui facit per alium facit per se.* But it is a long stride from this to say that where there are two individuals they are as a matter of law incapable of making a contract under all circumstances ". It is submitted, with respect, that neither argument carries unquestionable conviction. The former is disproved by the very existence of the absolute prohibition against purchases by the trustee himself which must perforce be credited to Lords Thurlow and Eldon, and the latter rests on the fallacious premise, previously dismissed, that the principal rule is but a consequence of the general proposition of law that a man cannot contract with himself. Rather, just because its rationale is conceived to be found in the wider principle of public policy that " the Court will not allow a person to be placed in a position in which his interest shall pull him one way and his duty the other " (*per* Fry, J., in *Boswell* v. *Coaks,* 23 Ch. D. 302, 310), there is strong ground for the contention that its scope extends so as to visit with unqualified disapprobation any purchase of the trust property by members of the trustees' family.

In this connection we may profitably revert once more to Lord Eldon's practical justification for the generality of the undisputed prohibition, which is found in the consideration that the trustee may have information regarding the value of the estate which places him in a position where his integrity might become suspect if he acquired a direct interest in the subject-matter of the trust, even although he gave what appears to have been the best value, no Court being equal to the examination and ascertainment of the truth. Is not the conflict between duty and interest equally acute in the presence of the temptation to divulge his knowledge, to which the beneficiaries alone have a legitimate claim, to his wife, so as to benefit himself at least indirectly? And does not the admitted difficulty—and indeed impossibility—of scrutinising the minutiæ of such transactions apply with equal force to a purchase by the trustee's wife or son? Such was the view expressed by Salmond, J., in his considered judgment in *Robertson* v. *Robertson* (*supra,* at p. 555) :

> " If there are any purposes for which a husband and wife are still to be treated as one person, I think this is an instance in which the rule should be applied. In the first place, a husband has so direct an interest in the pecuniary advantage of his wife that in the administration of his trust her interests should be regarded as equivalent to his own. In the second place, the special nature of the matrimonial relationship is such as to render all but impracticable any inquiry into the question whether a purchase by the wife of a trustee is not in reality a purchase by the trustee himself

in his wife's name, or at all events a purchase in which the husband possesses some pecuniary interest ".

This sequence of reasoning, which is equally cogent *in pari materia* of purchases by the trustee's son, recently also commended itself to Herring, C.J., in *Tanti* v. *Carlson*, [1948] V. L. R. 401, and, in the present writer's submission, follows most closely the spirit of those relevant pronouncements by English Courts which have been commented on above. In neither of these cases, however, was it necessary finally to adopt that " salutary rule " because, even on the assumption that the matrimonial relationship was merely a cause for suspicion, there were facts which prevented the inference from being rebutted that the sale was in reality for the trustee's own benefit.

The most effective argument against raising such presumption to the status of an irrebuttable postulate would appear to be the difficulty of delineating the ambit beyond which it should not operate with absolute rigidity. A good argument can, it is believed, be advanced for placing purchases by the trustee himself and his wife into one legal category, but it must be conceded that sales to the trustee's children may warrant a more flexible approach.

If the elastic principle were to be generally adopted, the further question arises towards what object the evidence should be directed which could effectively dispel the Court's suspicion. It seems clear that the test which prevails in order to support a purchase by the trustee from his *cestuis que trust* under the rule in *Coles* v. *Trecothick* (1804), 9 Ves. 234, would not be altogether appropriate or adequate in this context. Not appropriate, because proof that the parties were at arms' length can serve no purpose where the objective is not to protect one of the immediate parties to the bargain from being taken alvantage of by the superior position and knowledge of the other but to prevent the trustee from indirectly acquiring an interest in the subject-matter of the trust. Nor adequate, because the mischief to be guarded against is the employment of a circuitous device by the trustee with the object of purchasing for himself under the cover of selling to his wife or other relative. Thus, even if the disapprobation of such sales be not absolute, the criterion of their validity must yet have reference to the recognised unqualified prohibition against purchases by trustees on their own account. Proof that adequate consideration has been furnished by the purchaser should not, it is submitted, be regarded as conclusive but ought to be corroborated by satisfactory evidence that, in the words of Lord Mackenzie in *Burrell* v. *Burrell* (*supra*, at p. 339), " the husband was not the party intervening in the case ". This conclusion appears to have been tacitly acknowledged by all the Judges before whom the validity of these transactions has been agitated. The somewhat ambiguous order in *Re Douglas* (*supra*) to the effect that the Registrar should satisfy himself before registering the transfer that the sale was made *in good faith* and for adequate consideration can also be understood in the suggested sense. In *Tanti* v. *Carlson* (*supra*), this issue did not require judicial comment in the presence of evidence that the sale was at undervalue in the rather special circumstances of that case, but in *Robertson* v. *Robertson* (*supra*), Salmond, J., upset one sale on the suspicion that a substantial portion of the purchase money had in reality been provided by the trustee-husband and a series of others in

the conviction that the purchases originated in an understanding between the respective spouses that the houses, at any rate, which were to be erected on the sites were to be occupied by both and to be built at the expense of the trustees and not the immediate purchasers. In these circumstances, the learned Judge was satisfied that the husbands had such an interest in the properties as to invalidate the transactions no less than if they had been carried out in their own names.

It inevitably follows that a sale of the trust estate by a trustee to a third party as trustee for the former's wife is not only tainted to the same extent as a direct purchase by the wife herself, but that the very intervention of an intermediary would raise a strong presumption that the transaction was a surreptitious device on the part of the trustee to gain control over the property for his own benefit (cf. *Robertson* v. *Robertson, supra,* at p. 557).

THE TRANSITIONAL PROVISIONS OF THE 1925 PROPERTY ACTS

TENANCIES IN COMMON, JOINT TENANCIES AND TENANCIES BY ENTIRETIES

By H. Woodhouse, M.A., Solicitor

(*continued from p.* 215, *ante*)

G. Settled land—the special case

Paragraph 4 of Part IV of the First Schedule to the L. P. A.

Paragraph 4 (added by the L. P. (Amdt.) Act, 1926) is as follows:

" Where, immediately before the commencement of this Act, there are two or more tenants for life of full age entitled under the same settlement in undivided shares, and, after the cesser of all their interests in the income of the settled land, the entirety of the land is limited so as to devolve together (not in undivided shares), their interests shall, but without prejudice to any beneficial interest, be converted into a joint tenancy, and the joint tenants and the survivor of them shall, until the said cesser occurs, constitute the tenant for life for the purposes of the Settled Land Act, 1925, and this Act ".

The following points are noted:—

(i) *Effect of para.* This para. creates a limited exception to the general scheme of the creation of a trust for sale where land is held in undivided shares. There is no parallel provision in the S. L. A. in the case where settled land after 1925 comes to be held in undivided shares in possession. Such a case would fall within the general rule of section 36 of the S. L. A. and the trustees of the settlement would be entitled to require the legal estate to be vested in them upon the statutory trusts.

(ii) *Limited application of para.—examples.* Para. 4 would cover the case where immediately before January 1, 1926, land stood limited to A and B as tenants in common for life, remainder to C for life, remainder to D in fee simple. In such a case after the cesser of A's and B's interests the entirety is limited so as to devolve as a whole on C for life and then on D in fee simple. The para. is, however, of very limited application, as the following cases will indicate :—

(a) If in the illustration above, the interests of C and D had been liable to be defeated by the exercise of a power of appointment, para. 4 would not have applied. This point was decided in *Re Colyer's Farningham Estate,* [1927] 1 Ch. 677. In that case a testator had by his will given his residuary real estate to trustees upon trusts under which the property was, immediately before January 1, 1926, held upon trust for two persons during their lives in undivided shares and subject thereto upon trusts for the benefit of the testator's sons and grandsons as L should by deed or will appoint, and in default of and subject to any such appointment in trust for the testator's heir. The power of appointment had not been exercised before January 1, 1926, though the appointor was still alive and capable of exercising it. The Court held that in applying para. 4 regard had to be had to the limitations subsisting immediately before the commencement of the Act and not to any dealing with or devolution of the interest of any person taking under the limitations of the settlement. The Court also held that para. 4 could only apply where immediately before the commencement of the Act, the interests of the tenants for life were followed by a vested indefeasible limitation not in undivided shares. Consequently, as in the present case the ultimate remainder to the testator's heir was liable to be defeated by the exercise of the power of appointment, para. 4 did not apply, but the entirety was vested in the trustees of the will under para. 1, sub-para. (3). (Note : In view of *Re Dawson's S. E.*, [1928] Ch. 421, a Court would probably now hold that the case fell within sub-para. (1) and not sub-para. (3) of para. 1, as the entirety was immediately before January 1, 1926, vested in trustees : see head D, § 2, above.)

(b) If in the illustration above, instead of the limitations in remainder of the entirety to C for life and D in fee simple, there had been a limitation to C and D in fee simple upon trust for sale, para. 4 would not have applied. This point was established in *Re Higgs and May's Contract,* [1927] 2 Ch. 249, where, under a will coming into force prior to 1926, it was provided that the trustees should receive the whole income arising from the trust estate and should divide the same equally between all the testator's children and the child or children of any child who might be dead (such child or children to take *per stirpes*); and when and so soon as all his children should be dead except two, the trustees should sell and invest the trust estates and divide the proceeds equally between his two surviving children and the child or children of deceased sons and daughters, such last mentioned children, if more than

one, to take equally between them one equal share of the proceeds of sale. On December 31, 1926, the trust estate was held upon trust to divide the income therefrom amongst ten children, seven grandchildren and the personal representatives of a deceased grandchild. The Court held that as the entirety of the land was under the limitation of the settlement to become vested in trustees for sale after the cesser of all the life tenants' undivided shares, it could not be said to " devolve together (not in undivided shares) ". The word " devolve " was construed to mean " descend ". Consequently the Court held that para. 4 did not apply but that the entirety vested in the trustees under para. 1, sub-para. (3) (but in view of *Re Dawson's S. E.*, [1928] Ch. 421, a Court would probably now hold that sub-para. (1) applied as the land was vested in trustees). The construction of the word " devolve " to mean " descend " would seem to lead to the conclusion that para. 4 cannot apply in any event where after the cesser of the life interests of the tenants in common, the land does not remain settled land. Thus where the limitation is to A and B as tenants in common for life remainder to C in fee simple, there is, after the cesser of A's and B's interests, no " descent " of the land but only an absolute limitation to C and hence there being no " devolution " within para. 4, that para. would not apply but the case would fall within sub-para. (1) or sub-para. (3) of para. 1. (See Wolstenholme and Cherry's *Conveyancing Statutes*, Vol. 1 (12th ed.), p. 627.)

(c) If the limitation is to A and B for life, remainder to B in fee simple, para. 4 does not apply. Para. 4 cannot apply where the person on whom the entirety devolves after the cesser of all the life tenancies is himself one of the life tenants. It can only apply where the interests of *all* the tenants for life in the income of the settled land have ceased (the words in the para. being " after the cesser of *all* their interests in the income of the settled land "). This point was decided in *Re Barrat*, [1929] 1 Ch. 336, where a testator who died in 1881, leaving a widow and eight children, by his will gave his estate to his wife and four of his children, whom he appointed executors and trustees, upon trust to pay the income of his freeholds and leaseholds to his widow for life and after her decease to pay such income to his sons and daughters in certain shares which were to cease at death, with a proviso as to payments to widows of sons, and subject thereto he gave his estate to the survivor of his children absolutely. The widow died in 1900 and immediately before January 1, 1926, three children of the testator were alive. For the reason stated above, para. 4 was held inapplicable and (following *Re Dawson's S. E.*, [1928] Ch. 421) it was decided that the entirety was vested in the surviving trustee of the will under para. 1, sub-para. (1).

(iii) *Difference in wording of paras. 1 and 4.* It should be noted that para. 4 is worded differently from para. 1 in that there is no express reference to the undivided shares being vested in possession. The phrase " tenant for life " in para. 4 would, however, on the basis

of the reasoning in *Re Ryder and Steadman's Contract*, [1927] 2 Ch. 62 (see head D, § 4 (iii)) have the meaning given to it in the old S. L. Acts and section 2 (5) of the S. L. A. 1882, describes the tenant for life as the person who is for the time being "beneficially entitled to possession of the settled land". Presumably, therefore, para. 4 only applies where immediately before January 1, 1926, two or more tenants for life are entitled in possession.

(iv) *Exclusion of rule in Re Dawson.* The rule in *Re Dawson's S. E.*, [1928] Ch. 421 (see head D, § 2 above) clearly has no application to para. 4, as that para. is entirely separate from para. 1. Hence if, immediately before January 1, 1926, land was held by trustees upon trust for A and B for life in equal shares, remainder to C for life, remainder to D in fee simple, para. 4 would apply and the fact that the land was vested in trustees would not alter the position.

(v) *Creation of joint tenancy.* Where para. 4 applies, the tenants in common for life become joint tenants (without prejudice to their beneficial interests) and together they constitute the tenant for life under the settlement (section 19 (2) of the S. L. A.). The legal estate in the land vests in them and the powers of a tenant for life are exercisable by them.

(vi) *Saving for pre-L. P. (Amdt.) Act conveyances.* A purchaser who acquired title after December 31, 1925, and before June 16, 1926, in reliance on a trust for sale created by para. 1, is protected by section 7 of the L. P. (Amdt.) Act, 1926, in a case where para. 4 would apply.

H. The nature and effect of the statutory trusts

(i) *The Statutory Trusts.* Section 35 of the L. P. A. sets out the "statutory trusts" as follows: "For the purposes of this Act land held upon the 'statutory trusts' shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land.

Where—

(a) an undivided share was subject to a settlement, and

(b) the settlement remains subsisting in respect of other property, and

(c) the trustees thereof are not the same persons as the trustees for sale,

then the statutory trusts include a trust for the trustees for sale to pay the proper proportion of the net proceeds of sale or other capital money attributable to the share to the trustees of the settlement to be held by them as capital money arising under the Settled Land Act, 1925".

(ii) *Further powers of the Statutory Trustees.* Under section 25 (1) of the L. P. A. the statutory trustees have a power to postpone sale. Under section 26 (3) of the L. P. A. they are required, so far as is

practicable, to consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, and, so far as is consistent with the general interests of the trust, to give effect to the wishes of such persons, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons. A purchaser is not concerned to see that this requirement has been complied with.

(iii) *The overriding effect of the Statutory Trusts.* The statutory trusts created by virtue of the L. P. A. are paramount to and override the trusts contained in the instrument under which the land is held in undivided shares. Thus—

(a) A power to partition contained in a will or settlement, being *pro tanto* inconsistent with the statutory trusts for sale, cannot be treated as an " additional or larger power " under section 28 (1) of the L. P. A. and so preserved, but is overridden by the statutory trusts (*Re Thomas*, [1930] 1 Ch. 194).

(b) A right of pre-emption granted by a will is overridden by the statutory trusts, not being " an equitable interest or power " within section 3 of the L. P. A., or an " additional or larger power " under section 28 (1) or an " incumbrance " within Part IV, para 1, sub-para. (9) of the First Schedule (*Re Flint*, [1927] 1 Ch. 570).

(c) A restriction as to the time of sale may be overridden (*Re House*, [1929] 2 Ch. 166, where a power to sell after the expiration of five years from the testator's death, by auction only and not by private treaty, was held to be overridden).

(d) A condition precedent to a gift may be rendered impossible and so destroyed (*Re Thomas's Will Trusts*, [1930] 2 Ch. 67, where the condition precedent become impossible by reason of the conversion of an undivided share in land into personalty).

(e) The exercise of the statutory trust for sale may defeat a forfeiture clause. Thus in *Re Davies' Will Trusts*, [1932] 1 Ch. 530, land was, immediately before January 1, 1926, vested in A as trustee of a will upon trust in undivided shares for A for life or until remarriage, B for life or so long as he should reside upon and assist in the management of the property, and C and D for their lives. By virtue of sub-para. (1) of para. 1 of Part IV the entirety was vested in A upon the statutory trusts. It was held that the exercise by A of the power of sale or leasing vested in A by virtue of the statutory trust would not operate to forfeit B's life interest.

(f) The statutory trust for sale may be exercised without the leave of the Court, even though prior to 1926 the trusts of the instrument were being administered by the Court and a receiver had been appointed (*Bernhardt* v. *Galsworthy*, [1929] 1 Ch. 549).

On the other hand, it was held in *Re Pedley*, [1927] 2 Ch. 168, that a solicitor's remuneration clause contained in the instrument creating the undivided shares applied to work done in connection with the statutory trusts, and in *Re Buchanan-Wollaston's Conveyance*, [1939] Ch. 738 (a joint tenancy case, where the statutory trusts arose under section 36 of the L. P. A.), the Court refused to exercise its power

under section 30 of the L. P. A. to compel a sale, when this would have the effect of overriding and defeating an express contract between the trustees in whom the property was vested.

(iv) *Destruction of tenant for life's pre-1926 S. L. A. powers.* The vesting of the land in trustees upon the statutory trusts under Part IV will have the effect of destroying the powers exercisable by tenants for life in undivided shares before 1926 under the S. L. Acts, 1882–1890, such as the powers of sale, leasing, mortgaging, etc. Under section 29 of the L. P. A., however, the trustees for sale can revocably delegate their powers of leasing and management to any person of full age (not being merely an annuitant) for the time being beneficially entitled in possession to the net rents and profits of the land.

(v) *Conversion of realty into personalty.* The creation of the statutory trusts in cases where land is limited to persons in undivided shares in possession changes an undivided share in land into an interest in personalty, by reason of the operation of the equitable doctrine of conversion. Thus—

(a) *Entailed interests.* An entailed interest subsisting before 1926 in an undivided share became converted into an absolute interest in personalty because prior to 1926 an entailed interest could not exist in personalty and the section of the L. P. A. which now permits such an interest to be created (section 130 (1)) only applies to instruments coming into operation after 1925. This point was decided in *Re Price*, [1928] Ch. 579. The effect of this decision was reversed by section 1 of the Law of Property (Entailed Interests) Act, 1932, which operated to preserve as an entailed interest in personalty the former entailed interest in the undivided share of land. In *Re Hind*, [1933] Ch. 208, the 1932 Act was held not to extend to a base fee and by operation of the statutory conversion the base fee in that case was regarded as becoming after 1925 an absolute interest in personalty. The question whether the persons entitled in undivided shares in possession for their lives can be regarded as "protectors of the settlement" for the purposes of the Fines and Recoveries Act, 1833, so as to consent to the barring of an entailed interest in remainder in the proceeds of sale of land (such entailed interest being created under section 130 (1) of the L. P. A. or preserved under the L. P. (Entailed Interests) Act, 1932) is doubtful. The point is discussed in 81 S. J., p. 151, where it is suggested that no consent is necessary, as the persons entitled in possession have since 1925 no interest in land.

(b) *Residuary devises and bequests.* An undivided share in land passes under a residuary bequest of personalty and not under a residuary devise of realty (*Re Kempthorne*, [1930] 1 Ch. 268), but compare (c) below.

(c) *Ademption of specific devises.* A specific devise of "a moiety or equal half part or share" in Blackacre contained in a will made in 1922 of a testator who died in 1929 without altering or confirming his will was held in *Re Newman*, [1930] 2 Ch. 409, to be adeemed by virtue of the imposition of the statutory trust under Part IV of the First Schedule to the

L. P. A. and the conversion into personalty resulting therefrom. But in *Re Warren*, [1932] 1 Ch. 42, where the will containing a specific devise of the testatrix's " share in " Blackacre was confirmed by a codicil made after 1925, which did not refer to the specific devise, it was held that there was no ademption but that the devisee took the share in the proceeds of sale of the land. A similar case is *Re Wheeler*, [1929] 2 K. B. 81. These cases were followed in *Re Harvey*, [1947] Ch. 285 where all the previous cases were reviewed. Where the devise in a will made before 1926 is a devise of " all the testator's share and interest " in the land, it would appear that there will be no ademption even if the pre-1926 will is not confirmed by a post-1925 codicil. This seems to be clear from *Re Mellish* referred to at [1929] 2 K. B. 83 (note). It will be seen, therefore, that the exact words employed by the testator must be considered in each case as well as the date of the will, the date and existence of any codicil, and the date of the testator's death. See Vol. 20, *Conveyancer* (o.s.) p. 109.

(vi) *Effect of the creation of a Trust where no Trust previously existed.* The effect of the creation of a trust by the L. P. A. where no trust previously existed has been considered in the following cases :—

(a) *Powers of attorney.* In *Green* v. *Whitehead*, [1930] 1 Ch. 38 (where the statutory trust arose under section 36 of the L. P. A.) property was vested in A and B as joint tenants before 1926, and by virtue of section 36 of the L. P. A. they held it upon the statutory trusts after the coming into force of the L. P. A. In 1928, the property having been contracted to be sold, B appointed X as his attorney and X and A together executed the conveyance to the purchaser. The conveyance stated that the vendors sold in exercise of the trust for sale. It was held that the conveyance was not properly executed, since A and B were selling as trustees and normally a trustee cannot appoint an attorney to exercise the trusts. The powers to delegate the trusts to an attorney, contained in section 23 (2) of the Trustee Act, 1925 (which relates to land overseas) and in section 25 of that Act (which authorises a general delegation where a trustee is proceeding overseas for a period exceeding one month) were clearly inapplicable to the present case.

(b) *The Statutes of Limitation.* The effect of the creation of a trust by the L. P. A. upon the running of the period of limitation was considered in *Re Landi*, [1939] Ch. 828, and *Re Milking Pail Farm Trusts*, [1940] Ch. 996. In *Re Landi*, A and B were tenants in common of certain premises in which they both resided until the end of 1923. The premises were then let and the rent was received by A alone until his death in May, 1935. It was contended that B's interest was divested at the end of twelve years by the operation of section 12 of the Real Property Limitation Act, 1833, but the Court held that as from December 31, 1925, section 12 of the 1833 Act ceased to apply to undivided shares, as after that date the undivided shares became interests in the proceeds of sale of land and A, having been transformed into a trustee, could not plead any

statute of limitation in respect of property retained by him or converted to his own use. An account of the rents received since December 31, 1925, was accordingly ordered. This case was followed in *Re Milking Pail Farm Trusts*, where undivided shares had been mortgaged in 1921 but nothing had ever been paid on account of interest or principal. The entirety vested in 1926 in the Public Trustee under para. 1, sub-para. (4) of Part IV. It was contended that the claim of the mortgagees to the proceeds of sale had been barred by section 8 of the Real Property Limitation Act, 1874, but the Court held that there was no statutory limitation to bar the claim of the mortgagees, because from January 1, 1926, the proceeds of sale were held on an express trust for the mortgagees and they were beneficially entitled to the whole of such proceeds.

(vii) *Effect of the Statutory Trusts upon the Howe* v. *Earl of Dartmouth rule.* The provisions of section 28 (2) of the L. P. A. that, where there is a trust for sale of land, the net rents and profits until sale shall be paid or applied in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made and the proceeds had been duly invested, were held in *Re Brooker*, [1926] W. N. 93, to exclude the application of the *Howe* v. *Earl of Dartmouth* rule in a case where leaseholds had, as part of a residuary estate, been bequeathed to trustees upon trust for sale with a power to postpone conversion. *Re Brooker* was applied in *Re Berton*, [1939] Ch. 200, where leaseholds held under a will upon trust for persons in undivided shares before 1926 became subject to the statutory trusts under Part IV of the First Schedule to the L. P. A. and in consequence it was decided that the entire income from the leaseholds was payable to the tenants for life under section 28 (2) of the L. P. A.

(viii) *Further suggested effects.* Further consequential effects of the transitional provisions of the L. P. A. concerning undivided shares are suggested by Mr. A. H. Withers in 76 S. J., p. 281, *viz.* :—

(a) That they would prevent a long term of years of an undivided share being enlarged into a fee simple under section 153 of the L. P. A., as that section applies only where a specified residue of a term is subsisting in *land* and under section 205 (1) (ix) the word "land" in the L. P. A. does not include an undivided share in land.

(b) That they would prevent, in respect of an undivided share in land, an executory limitation over in default of issue becoming void under section 134 of the L. P. A. on issue attaining twenty-one after 1925 (see also 76 S. J., p. 179), since section 134 only applies, as regards instruments coming into operation before 1925, to limitations of *land* and an undivided share is not "land" (section 205 (1) (ix)).

(c) That they would prevent an incumbrance on undivided shares being discharged by the Court under section 50 of the L. P. A., as that section only applies where *land* is subject to any incumbrance.

I. Appointment of new trustees of the statutory trusts

A difficulty arises in connection with the appointment of new trustees in cases where by virtue of Part IV statutory trusts are engrafted on pre-existing trusts. This particularly concerns cases under sub-para. (1) of para. 1 when the entirety of the land was vested in trustees prior to 1926 and is by the operation of sub-para. (1) held by them upon the statutory trusts. The problem is whether the new trustees must be appointed expressly (and perhaps by separate instruments) as new trustees of the statutory trusts or whether an appointment of new trustees of the pre-existing trusts operates automatically as an appointment of new trustees of the statutory trusts. The whole matter is really one aspect of the question of the extent to which the statutory trusts are separate from and paramount to the pre-existing trusts, a question on which the decided cases, discussed at head H (iii) above, show conflicting tendencies. In the unreported case of *Re Wilson*, mentioned in 67 L. J. Newsp., p. 137, 72 L. J. Newsp., pp. 105 and 191, and 75 S. J., pp. 668 and 694, Astbury, J., appears to have taken the view that separate appointments were unnecessary. The facts of that case were, however, unusual, as the new trustee (B) was appointed directly under the will by a substitutionary appointment and not in exercise of a power of appointing new trustees, the will itself declaring that, on the death of A (one of the trustees), B should become a new trustee of the will in his place. On these facts Astbury, J., held that B became a new trustee under and by virtue of the will of the unsold property of the testator upon the statutory trusts. It is not clear to what extent the case of *Re Wilson* is relevant to the normal case where a new trustee is appointed under section 36 of the Trustee Act, 1925. If the statutory trusts are separate from and override the trusts of the instrument creating the undivided shares, as is suggested by such cases as *Re Flint*, [1927] 1 Ch. 570, and *Bernhardt* v. *Galsworthy*, [1929] 1 Ch. 549, then for the purpose of section 36 (1) (*a*) of the Trustee Act (which provides that the power of appointing new trustees shall in the first instance be exercised by " the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust ") the " instrument creating the trust " is, so far as regards the pre-existing trusts, the instrument setting out those trusts, but so far as regards the statutory trusts it is the L. P. A. itself—the word " instrument " in the Trustee Act including an Act of Parliament (section 68 (5)); with the result that the appropriate appointor for the purpose of the pre-existing trusts may be the person nominated by the deed or will setting out those trusts, while for the purpose of the statutory trusts it will be the continuing trustees, as no person is " nominated for the purpose of appointing new trustees " by Part IV of the First Schedule to the L. P. A. In order to avoid doubts it is in practice desirable that the instrument appointing the new trustee should state expressly that he is appointed a new trustee of the statutory trusts. In a case where by the instrument creating the pre-existing trusts, a person has been nominated as having the power to appoint new trustees, it is also desirable, as a precaution, that the continuing trustees should join in the appointment of a new trustee for the purpose of confirming the appointment so far as regards the statutory trusts. If this precaution has not been taken and no

confirming appointment has been made, a recital in a subsequent conveyance, in which the continuing and new trustees join, stating that the continuing and new trustees are trustees of the statutory trusts, may operate to cure the defect (if any) arising, the subsequent conveyance having the effect of an implied appointment (*Re Farnell's S. E.*, 33 Ch. D. 599). For a discussion of the whole question see 67 L. J. Newsp., p. 137; 72 L. J. Newsp., pp. 105 and 191; 75 S. J., pp. 668 and 694; 76 S. J., p. 280; 81 S. J., p. 289; and 194 L. T. Journal p. 62.

It is not thought that section 35 of the Trustee Act, 1925, which requires appointments of new trustees of conveyances of land on trust for sale on the one hand and of the settlements of the proceeds of sale on the other hand to be effected by separate instruments, has any application to the case where the trust for sale is created by the operation of Part IV of the First Schedule to the L. P. A. Although the L. P. A., which creates the statutory trusts, is an "instrument" for the purposes of the Trustee Act, 1925 (section 68 (5)), it is not a "conveyance on trust for sale" or a "settlement of the proceeds of sale".

K. Partnership land

The effect of the transitional provisions of the L. P. A. 1925, upon partnership land has been a subject of considerable difficulty. To some extent the position was clarified by the case of *Re Fuller's Contract*, [1933] Ch. 652 (see D, § 1 (ii) above), but difficulties still remain.

Prior to 1926 the following forms of limitation were in use as respects partnership land (see 33 S. J., p. 102, and 75 L. J. Newsp., p. 251):—

(1) To a trustee in fee simple in trust for the partners as part of their partnership property.

(2) To the partners as joint tenants in fee simple—
  (a) without further words;
  (b) with the addition of the words "as part of their partnership property";
  (c) with the addition of the words "in trust for the partners their executors, administrators, or assigns";
  (d) with the addition of the words set out in (b) and (c) together.

(3) To the partners as tenants in common in fee simple—
  (a) without further words;
  (b) with the addition of the words "as part of their partnership property".

(4) An addition may have been made to either of the above forms, giving power to the surviving partner, his executors or administrators, or to the trustee, to sell, mortgage, lease or dispose of the property.

Of these forms it would seem that (2) (b) was in most common use, but frequently the words in (4) were also added.

Where form (3) was used it seems clear that the case fell within Part IV of the First Schedule to the L. P. A. in the ordinary way, the

land being vested in undivided shares by reason of the express limitation to the partners as tenants in common.

Where, however, forms (1) or (2) were used, it was widely thought (see 71 S. J. 754; 72 S. J. 200, 218, 838; 75 S. J. 773; 67 L. J. Newsp. 337 and 356; 61 L. J. Newsp. 68), prior to the decision in *Re Fuller's Contract*, that Part IV was inapplicable. This opinion was based upon a consideration of the nature of a partner's interest in land, which according to section 22 of the Partnership Act, 1890, is to be treated as between the partners (including the personal representatives of a deceased partner) as personal and not real estate. The nature of the interest of a partner was described by Romer, L.J., in *Re Bourne*, [1906] 2 Ch. 427, as follows : " It is true that in a general sense the executors or administrators of the deceased partner may be said to have a lien upon the partnership assets in respect of his interest in the partnership on taking the partnership account, but that lien is not one which affects each particular piece of property belonging to the partnership so as to affect the property in the hands of any person dealing with the surviving partner in good faith. It is really what one may call a general lien upon the surplus assets. . . . It is to be borne in mind that the real interest of the partnership in real estate is of a personal character, because wherever the legal estate may be, whether it is in the partners jointly or in one partner or in a stranger, it does not matter; the beneficial interest in the real estate belongs to the partnership with an implied trust for sale for the purpose of realising the assets and for the purpose of giving to the two partners their interest when the partnership is wound up and an account taken ".

On the basis of this doctrine it was thought that a partner could not be said to have any specific beneficial interest in the particular items of property belonging to the partnership and could not, in particular, be regarded as entitled in equity to an undivided share in the partnership land, at any rate where there was no express limitation to the partners as tenants in common. Accordingly it was considered that Part IV of the First Schedule to the L. P. A. did not apply to partnership land limited as in forms (1) or (2) above.

This view, however, was rejected by the Court in *Re Fuller's Contract*, [1933] Ch. 652. The facts of this case were that in 1892 property was conveyed to six persons as joint tenants " in trust for themselves, their executors, administrators and assigns as part of their co-partnership estate ". On January 1, 1926, three of the original six partners were living. The Court held that this case fell within para. 1 of Part IV, as in the opinion of the Court the three survivors held the property immediately before January 1, 1926, in trust for persons entitled in undivided shares. Accordingly the legal estate vested in the three survivors as trustees upon the statutory trusts under sub-para. (1) of para. 1 of Part IV.

This decision appears to cover limitations in both forms (1) and (2) above and the practical consequence, therefore, is that limitations in any of the forms set out above must be treated as falling within Part IV of the First Schedule to the L. P. A.

The actual manner of application of Part IV to individual cases is not, however, free from difficulty. In *Re Fuller's Contract* the original limitation was by way of an express trust and accordingly it

was possible to regard the entirety as being vested in trustees and to treat the case as falling within sub-para. (1) of para. 1 (land vested in trustees). Where, however, the original limitation created no express trust but was merely to (*e.g.*) A, B and C as joint tenants in fee simple as part of their partnership property, it is not clear whether sub-para. (1) or sub-para. (2) of para. 1 of Part IV is to be treated as applying. In this example, the point has no practical significance as either para. will (assuming that A, B and C are of full age and have not incumbered their separate shares) achieve the same result (legal estate vested in A, B and C as joint tenants upon the statutory trusts). If there had been six partners instead of three (legal estate limited to A, B, C, D, E and F) and they were all surviving when the L. P. A. came into force, the point would be of importance, for sub-para. (1), if it applied, would operate to vest the legal estate in all the trustees (A, B, C, D, E and F), while if sub-para. (1) did not apply, the case would fall under sub-para. (4) and the legal estate would vest in the Public Trustee.

In view, however, of section 20 (2) of the Partnership Act, 1890, which provides that the legal estate in any land which belongs to the partnership shall devolve *in trust* so far as is necessary for the persons beneficially entitled thereto, it is thought that a Court would regard land limited directly to the partners as part of their partnership property as being held on trust and would thus treat all these cases as falling within sub-para. (1) of para. 1 of Part IV.

It may be noted that there is no limit on the number of persons in whom the legal estate may be vested as trustee under sub-para. (1) of para. 1 of Part IV (see the example given above), though, of course, no new trustees of the statutory trusts may be appointed until the number is reduced to less than four (section 34 (1) of the Trustee Act, 1925).

Where Part IV operates to impose the statutory trusts, it would appear that these trusts would override any express power given by the original instrument to the surviving partners to convey the land without the concurrence of the personal representatives of a deceased partner. This is an application of the doctrine of the overriding effect of the statutory trusts (see H (iii) above, and *Re Flint*, [1927] 1 Ch. 570). Thus if, for instance, before 1926 land had been conveyed to A and B as joint tenants as part of their partnership property with full power for the survivor to sell or mortgage the land (*i.e.*, following form (4) above) and B had died before December 31, 1925, then para. 1 of Part IV would operate to make A trustee of the land upon the statutory trusts but A would be unable to sell the land without appointing an additional trustee to receive (with him) the capital money produced by such sale (see 77 S. J., p. 314).

A point of theoretical interest arises in cases where before 1926 land was limited to partners in such a way that the legal and equitable interests of each partner were equal and co-extensive, *e.g.*, where land was conveyed to A, B and C in fee simple upon trust for themselves in equal shares, or to A, B and C in fee simple as part of their partnership property and their interests in the partnership were equal. In such a case it is arguable that the doctrine of merger applied and that the equitable interest was merged in the legal estate; for normally, where

equitable and legal estates, equal and co-extensive, united in the same person, the equitable estate merged. The application of this doctrine to joint tenancies and tenancies in common was considered in *Re Selous*, [1901] 1 Ch. 921, where A, who was trustee for X and Y as tenants in common, conveyed the legal estate to X and Y at their request as joint tenants. In that case the Court held that the difference between the estate of a joint tenant and a tenant in common was so small and shadowy, that the equitable tenancy in common of X and Y merged in the legal joint tenancy and thus ceased. The doctrine could, of course, only apply where the estates were *equal and co-extensive*. If the *Re Selous* doctrine is regarded as applicable to partnership cases of the type mentioned above, it would mean that the equitable undivided shares had no existence on December 31, 1925, and that such cases did not fall within Part IV at all but within section 36 of the L. P. A. as beneficial joint tenancies. In practice this would not matter much as both section 36 and sub-para. (1) of para. 1 of Part IV would merely operate to attach the statutory trusts to the legal estate vested in the several partners prior to January 1, 1926. It is, however, doubtful whether *Re Selous* represented a proper application of the doctrine of merger. A strong criticism of the case is contained in Williams' *Vendor and Purchaser*, 4th ed., Vol. 1, pp. 501 and 502, footnote (*r*).

Subject to any possible complications arising from the doctrine of merger, it would appear that, as a result of the decision in *Re Fuller's Contract*, a limitation to or in trust for partners as joint tenants as part of their partnership property cannot be considered as a beneficial limitation to or in trust for any persons as joint tenants within the meaning of section 36 of the L. P. A. 1925. The contrary view, set out in Wolstenholme and Cherry's *Conveyancing Statutes*, 12th ed., Vol. 1, p. 283, would seem to have been overruled by *Re Fuller's Contract*.

For notes upon the question of partnership land reference should be made to 77 S. J., pp. 228 and 314, and 75 L. J. Newsp., p. 251 A general review of the position as a whole is contained in Williams' *Vendor and Purchaser*, 4th ed., Vol. 1, pp. 500–505.

JOINT TENANCIES

(i) *Transitional effect of L. P. A.* 1925, *and S. L. A.* 1925, *provisions*. In spite of the absence of any definition of the phrase "undivided share" in the 1925 Acts and of the uncertainty concerning the exact scope of that phrase, it has been generally accepted by conveyancers that joint tenancies do not fall within the provisions of the L. P. A. or the S. L. A. relating to undivided shares. The L. P. A. and the S. L. A. do, however, contain certain provisions relative to joint tenancies and these provisions, though not appearing in the First Schedule to the L. P. A., have in a sense a transitional effect and can appropriately be considered in connection with Part IV of the First Schedule to the L. P. A.

(ii) *Section 36 of the L. P. A.* The principal L. P. A. provisions are contained in section 36, which is as follows :—

"(1) Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same

shall be held on trust for sale, in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity.

" (2) No severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, shall be permissible, whether by operation of law or otherwise, but this sub-section does not affect the right of joint tenant to release his interest to the other joint tenants, or the right to sever a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenants:

" Provided that, where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants a notice in writing of such desire or do such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity, and thereupon under the trust for sale affecting the land the net proceeds of sale, and the net rents and profits until sale, shall be held upon the trusts which would have been requisite for giving effect to the beneficial interests if there had been an actual severance.

" [Nothing in this Act affects the right of a survivor of joint tenants, who is solely and beneficially interested, to deal with his legal estate as if it were not held on trust for sale.]

"(3) Without prejudice to the right of a joint tenant to release his interest to the other joint tenants no severance of a mortgage term or trust estate, so as to create a tenancy in common, shall be permissible ".

The words in square brackets were added by the L. P. (Amdt.) Act, 1926.

(iii) *Section 19 (2) of the S. L. A. 1925.* Where land is settled land, section 36 of the L. P. A. does not apply. Joint tenancies of settled land are, however, dealt with by section 19 (2) of the S. L. A. as follows :—

> **" If in any case there are two or more persons of full age so entitled as joint tenants, they together constitute the tenant for life for the purposes of this Act ".**

This provision refers, of course, to joint tenants for life under a Settled Land Act settlement. No trust for sale arises in such cases by reason of the existence of joint tenancies.

(iv) " *Settled Land* "—*meaning.* In section 36 of the L. P. A. " settled land " means settled land under the S. L. A. 1925. This point was decided in *Re Gaul and Houlston's Contract,* [1928] Ch. 689. In that case, immediately before the coming into force of the L. P. A., land was held by two persons under a devise contained in a will made in 1888 as joint tenants in fee simple absolutely but subject to a charge for £1,000 created in 1869 in consideration of marriage. Such land is " settled land " within section 1 (1) (v) and section 2 of the S. L. A. 1925, though it was not settled land under the S. L. Acts, 1882–1890. The Court held on these facts that the land was " settled land " for the purpose of section 36 of the L. P. A. and accordingly was not subjected to a trust for sale by that section. The reason for the decision is that section 36 does not look to the state of affairs in existence immediately before the commencement of the Act (as does para. 1 of Part IV of the First Schedule in the case of tenancies in common), but to the state of affairs subsisting when the Act as a whole

came into operation, as section 36 came into force along with the rest of the Act. Hence there was no ground for giving "settled land" a meaning different from that contained in the definition section (section 205 (1) (xxvi) of the L. P. A.). It is interesting to contrast *Re Gaul and Houlston's Contract* (*supra*) with *Re Ryder and Steadman's Contract*, [1927] 2 Ch. 62—a decision on "settled land" in para. 1 of Part IV of the First Schedule to the L. P. A.

(v) *To what extent is section 36 (1) of the L. P. A. 1925, transitional?* The discussion in (iv) above shows that section 36 is not transitional in the same manner as is para. 1 of Part IV of the First Schedule, in that section 36 does not apply to the state of affairs existing *immediately before* the coming into force of the Act, while para. 1 of Part IV does. Nor is section 36 transitional in the same manner as is para. 3 of Part II of the First Schedule to the L. P. A. (which provides for the vesting of a legal estate in the person who, immediately after the commencement of the Act, is entitled to require such estate (not vested in trustees for sale) to be conveyed to or otherwise vested in him), even though that para. applies to the state of affairs existing *immediately after* the coming into force of the Act. A comparison of the following two cases illustrates these points :—

(a) *Re King's Theatre, Sunderland*, [1929] 1 Ch. 483. The full details of this case are rather complicated, but the relevant fact for the purpose of the present discussion is that *upon* the coming into force of the L. P. A. a legal estate was vested in A as bare trustee for X and Y as joint tenants in fee simple. X and Y were, therefore, persons who *immediately after* the coming into force of the Act were entitled to require a legal estate to be vested in them (A being merely a bare trustee) and consequently such legal estate would vest in them under para. 3 of Part II of the First Schedule provided that at the critical moment it was not vested in trustees for sale. Now section 36 (1) creates a trust for sale where land is beneficially limited to or held in trust for any persons as joint tenants. On these facts the Court decided that para. 3 of Part II of the First Schedule operated before section 36 (1) could take effect, even though para. 3 of Part II applies to the state of affairs existing *immediately after* the commencement of the Act. Hence the legal estate vested in X and Y under para. 3 of Part II and *then* section 36 took effect so as to attach a trust for sale to the legal estate thus vested in X and Y.

(b) *Re Forster*, [1929] 1 Ch. 146. In this case the position was that before the coming into force of the L. P. A. 1925, land was held by the personal representatives of a settlor in trust for persons entitled under the settlement in undivided shares, the settlement itself not having contained a conveyance of the land by the settlor to the trustees but merely a declaration of the settlement trusts. Prior to 1926 the settlement trustees were entitled to require the settlor's personal representatives to vest the legal estate in them. The question, therefore, arose whether the legal estate vested in the settlement trustees under para. 3 of Part II of the First Schedule to the L. P. A. as being the persons who *immediately after* the commencement of

the Act were entitled to require a legal estate (not vested in trustees for sale) to be vested in them. The Court held, however, that no vesting under para. 3 of Part II took place, because by the operation of sub-para. (1) of para. 1 of Part IV (which applies where *immediately before* the coming into force of the Act land was held in undivided shares in possession and the entirety was vested in trustees or personal representatives) the personal representatives had become trustees for sale *at the commencement* of the Act, and consequently the case came within the words of the exception " not vested in trustees for sale " in para. 3 of Part II. Hence the legal estate remained in the personal representatives who held it upon the statutory trusts for the persons entitled in undivided shares in possession.

The words in section 36 (1) of the L. P. A. " the same shall be held on trust for sale, in like manner as if the persons beneficially entitled were tenants in common ", do not bring into operation Part IV of the First Schedule in the case of a joint tenancy created before 1926 (*Re Gaul and Houlston's Contract*, [1928] Ch. 689).

In short, section 36 does not appear to have any vesting effect at all. It merely operates in the case of beneficial joint tenancies subsisting at the commencement of the Act to convert into trustees for sale the persons in whom the legal estate was vested when the transitional provisions proper had taken effect.

(vi) *Limitation upon the number of joint tenants—joint tenancies subsisting immediately before the commencement of the Act.* Where immediately before the commencement of the 1925 Acts land was already vested absolutely in more than four beneficial joint tenants of full age, there was no divesting or shifting of the legal estate under Part IV of the First Schedule (which would, by virtue of para. 1 (4) in the case of land vested absolutely in more than four beneficial tenants in common, operate to vest the legal estate in the Public Trustee), as Part IV of the First Schedule has no application to joint tenancies. Nor is there any provision in the Acts which can operate to vest the legal estate in the first four named joint tenants, where it was prior to 1926 held by five or more joint tenants. In such a case the legal estate will remain vested in the five or more joint tenants, but as section 36 (1) of the L. P. A. will operate to create a trust for sale, the provisions of section 34 (1) of the Trustee Act, 1925, will be brought into play and these provide that where at the commencement of the Act there are more than four trustees holding land on trust for sale, no new trustee shall be appointed until the number has been reduced to less than four and thereafter the number shall not be increased beyond four.

(vii) *Limitation upon the number of joint tenants—joint tenancies created after 1925.* Where, after 1925, land is limited to more than four persons of full age as joint tenants beneficially, the position is not entirely clear. Section 36 (1) of the L. P. A., as stated above, provides that where a legal estate is beneficially limited to or held in trust for *any persons* (there is no restriction of number) as joint tenants, the same shall be held (presumably by these persons) on trust for sale, in like manner as if the persons beneficially entitled were tenants in common. This provision, in the view of Wolstenholme and

Cherry's *Conveyancing Statutes* (12th ed.), Vol. 1, p. 283, has the effect of bringing section 34 of the L. P. A. into play. Now section 34 (2) of the L. P. A. provides that: "where, after the commencement of this Act, land is expressed to be conveyed to any persons in undivided shares and those persons are of full age, the conveyance shall (notwithstanding anything to the contrary in this Act) operate as if the land had been expressed to be conveyed to the grantees, or, if there are more than four grantees, to the four first named in the conveyance, as joint tenants upon the statutory trusts. . . ." Consequently it has been concluded (see *Encyclopædia of Forms and Precedents*, Vol. 14 (3rd ed.), p. 185, and Emmet's *Notes on Perusing Title* (12th ed.), Vol. 1, p. 389), that the effect of these provisions is, in the case of a post-1925 conveyance to five or more beneficial joint tenants, to vest the legal estate in the first four named grantees. It is not entirely clear that this conclusion is justified, since all that section 36 (1) of the L. P. A. says is that the legal estate beneficially limited to or held in trust for any persons "shall be held on trust for sale, in like manner, etc." The section does not refer to any vesting or to any limitation of the number of persons holding the land, and it might be held only to impose a trust for sale similar to that which would have arisen under section 34 if the legal estate had been expressed to be conveyed to persons as tenants in common, but without bringing into force that part of section 34 (2) which prevents the legal estate from vesting in more than four persons. If that view were correct, all the named grantees would hold the legal estate upon the statutory trusts notwithstanding that their number exceeded four. Compare the discussion of section 36 (1) in (v) above in connection with beneficial joint tenancies subsisting immediately before the commencement of the L. P. A., from which it would appear that section 36 (1) had no vesting effect in that connection.

Where the post-1925 conveyance to joint tenants expressly declares that they hold the land upon the statutory trusts or upon trust for sale (and in practice this is frequently done), there can be no doubt that the conveyance is a "disposition on trust for sale of land" for the purposes of section 34 (2) of the Trustee Act, 1925, which provides that in the case of dispositions on trust for sale of land made or coming into operation after 1925, "the number of trustees shall not exceed four, and where more than four persons are named as such trustees, the four first named (who are able and willing to act) shall alone be the trustees". In such an event the legal estate would vest in the first four named who are able and willing to act. Where, however, the conveyance to the joint tenants does not declare any trusts, it is not certain that it can be regarded as "a disposition on trust for sale of land" for the above purposes, merely by reason of the fact that section 36 (1) of the L. P. A. may serve to create a trust for sale.

In view, however, of the policy of the 1925 Acts to limit generally to four the number of persons who can hold a legal estate under dispositions coming into operation after 1925, it is thought that a Court would be inclined to decide that either under section 34 (2) of the L. P. A. or section 34 (2) of the Trustee Act, the legal estate must vest in the first four named grantees. Otherwise there would be a "casus omissus" in section 34 of the Trustee Act.

There is, however, no limit to the number of persons who being joint tenants may together constitute the tenant for life under section 19 (2) of the S. L. A.

TENANCIES BY ENTIRETIES

(i) *Provisions of Part VI of the First Schedule to the L. P. A. 1925.*

Part VI converts into joint tenancies any tenancies by entireties subsisting immediately before January 1, 1926, as follows :—

> **" Every tenancy by entireties existing immediately before the commencement of this Act shall, but without prejudice to any beneficial interest, as from such commencement be converted into a joint tenancy ".**

(ii) *Nature of tenancy by entireties at Common Law.*

" Tenancy by entireties occurs, at the common law, when a gift or conveyance, which, if made to two strangers, would create a joint tenancy, is made to a husband and wife during the coverture. . . . It constitutes the most intimate union of ownership known to the law. A husband, being tenant by entireties of freeholds with his wife, cannot by any alienation bar her right by survivorship in any part " (Challis, *Real Property*, 3rd ed., pp. 376–7). In addition the husband enjoyed the general right, given by common law in respect of his wife's freeholds, namely, the right to receive for his own benefit the rents and profits of the entirety of the land during the coverture.

(iii) *Effect of the Married Women's Property Act, 1882, upon tenancies by entireties.*

Tenancies by entireties were not abolished by the Married Women's Property Act, 1882. Where the limitation to the husband and wife took effect prior to January 1, 1883, the tenancy by entireties continued to exist as such on and after that date, and the characteristics outlined in para. (ii) above still applied. Where, however, the limitation to the husband and wife, which before January 1, 1883, would have made them tenants by entireties, took effect on or after that date, the view was taken in *Re March* (1884), 27 Ch. D. 166, and later in *Thornley* v. *Thornley*, [1893] 2 Ch. 229, that the Act operated to make the husband and wife joint tenants, the wife's interest belonging to her for her separate use with all the rights incident to a joint tenancy. Accordingly for a tenancy by entireties to be subsisting on December 31, 1925, it was necessary both that the parties should have been married and that the conveyance should have taken effect before January 1, 1883, and also that the husband and wife should still be alive. Consequently the number of tenancies by entireties remaining on December 31, 1925, cannot have been very great.

(iv) *Saving of beneficial interests.*

The conversion into joint tenancies of any tenancies by entireties subsisting immediately before the L. P. A. 1925, came into force did not affect any beneficial interest. Accordingly any right which the

husband had at common law to receive the rents and profits of the entirety during the coverture was preserved.

(v) *Limitations to husband and wife together with a third person.*

Connected with this subject are problems concerning limitations to a husband and wife and a third person.

(a) *Prior to the coming into force of the Married Women's Property Act, 1882.*

If, prior to January 1, 1883, a grant was made to a husband and wife and a third person and their heirs, then, in the absence of any expressed intention to the contrary in the instrument, the effect at common law was that the husband and wife took one moiety between them (which they together held as tenants by entireties) and the third person took the other moiety, in the same manner as if the land had been granted to two persons only, for the husband and wife were regarded as one person. In other words the husband and wife together constituted one of the joint tenants and the third person the other joint tenant.

The rule that the husband and wife were to be regarded as one person was not limited to grants creating joint tenancies but could also apply to a grant to a husband and wife and a third person creating a tenancy in common (*Warrington* v. *Warrington*, 2 Hare 54). Hence a grant to A and B (husband and wife) and C equally would operate, in the absence of a contrary intention, to give A and B one undivided fourth share each and C an undivided half share (*Re Jupp* (1888), 39 Ch. D. 148, where the limitation was to " A, the husband of A, and B in equal parts ").

This rule was, however, only one of construction and could be displaced by a contrary intention, which was held to exist in *Warrington* v. *Warrington* (*supra*) (where the limitation was " equally between A, B, C and the wife of C "), and in *Re Dixon* (1889), 42 Ch. D. 306 (limitation to " A, wife of A, B, C, D, E and wife of E to be divided equally between them share and share alike "). In both of these cases it was held that each grantee took an equal fraction of the property.

(b) *Between the coming into force of the Married Women's Property Act, 1882, and the Law of Property Act, 1925.*

The effect of the Married Women's Property Act, 1882, upon limitations to husbands and wives and third persons taking effect on or after January 1, 1883, was considered in *Re March* (1884), 27 Ch. D. 166, and *Re Jupp* (1888), 39 Ch. D. 148, and it was held that the 1882 Act was not intended to alter any rights except those of the husband and wife *inter se*. Consequently in *Re Jupp* a limitation " to A, the husband of A, and B *in equal parts* " still operated to give A one fourth part, A's husband one fourth part and B one half part. Where, however, a limitation after 1882 but before 1926 was merely to A, the wife of A, and B and their heirs (*without words of severance*), it seems clear (having regard to *Thornley* v. *Thornley*, [1893] 2 Ch. 229) that A and A's wife no longer became tenants by entireties of their half but that they became joint tenants *inter se*. What the position was as regards B, in such a case, is not clear, but, having regard to the decision in *Re Jupp* (*supra*) that the 1882 Act was not

intended to alter any rights except those of the husband and wife *inter se*, it is thought that B's position must have remained unchanged. Consequently the effect of such a limitation to A, A's wife and B and their heirs would, presumably, be that A and A's wife would still constitute one joint tenant *vis-à-vis* B and B would constitute the other joint tenant. If A's wife died leaving A and B surviving (and without having severed the joint tenancy), her interest would pass to A by survivorship and not to A and B. Admittedly such a limitation seems to constitute an exception to the rule that there must be unity of interest between all the joint tenants, but no doubt the answer to the difficulty lies in the fact that *vis-à-vis* B, A and A's wife still constituted one joint tenant. The point does not, however, seem to have been decided. In spite of its rather recondite nature the point is not one of purely antiquarian interest, since upon it depends the question whether on the coming into force of the L. P. A. 1925, a joint tenancy still subsisted (thus giving rise to a trust for sale under section 36 of the L. P. A.) or whether the land was held in undivided shares (thus leading to the application of Part IV of the First Schedule to the L. P. A.) as a result of the absence of unity of interest. Wolstenholme and Cherry's, *Conveyancing Statutes* (12th ed.), Vol. 1, p. 629, merely states : " If the property is limited to the husband, the wife and a third person as absolute owners, the legal estate will vest in all three upon trust for sale; Part IV, para. 1 (2); and as to the proceeds of sale upon trust as to one moiety for the husband and wife as joint tenants and as to the remaining moiety for the third person ". If, however, the above argument is correct, such a case would not seem to fall within Part IV at all but within section 36. No doubt if immediately before January 1, 1926, only three persons were interested (A, A's wife and B), there is no practical difficulty, since section 36 and para. 1 (2) of Part IV produce the same result (*i.e.*, that A, A's wife and B hold the legal estate upon the statutory trusts); but if more than four persons are interested (*e.g.*, if the limitation had been to A, A's wife, B, B's wife, and C and their heirs without words of severance), then, assuming that a joint tenancy still subsisted, the legal estate would remain vested in the persons in whom it was vested prior to January 1, 1926, but if the difference in the quantum of the interests had operated by severance to create a tenancy in common, then the legal estate would vest in the Public Trustee under Part IV, para. 1 (4). It is thought therefore that the view that, where the over-all limitation contains no words of severance, a joint tenancy persisted, is more in accord with the principle that the Married Women's Property Act, 1882, was only intended to alter the rights of the husband and wife *inter se* and is to be preferred. Where the over-all limitation did contain words of severance, the above problem does not arise since, whether the husband and wife were treated as one person for ascertaining the quantum of that interest or not, the land was limited in undivided shares and Part IV of the First Schedule to the L. P. A. applied.

The above remarks only apply to limitations coming into force after 1882 and before 1926. Where, however, the limitation came into force prior to 1883 and contained no words of severance (so that the husbands and wives were tenants by entireties *inter se*), then in the event of the interests still subsisting on the coming into force of the L. P. A., the

same problem arises. Presumably the conversion by Part VI of the First Schedule to the L. P. A. of the tenancies by entireties into joint tenancies does not affect the subsistence of the over-all joint tenancy.

(c) *After the coming into force of the L. P. A. 1925.*

The above problem does not arise with limitations coming into force after 1925 as section 37 of the L. P. A. 1925 provides that : " A husband and wife shall for all purposes of the acquisition of any interest in property, under a disposition made or coming into operation after the commencement of this Act, be treated as two persons."

THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949

By J. Muir Watt, M.A., Barrister-at-Law

The Landlord and Tenant (Rent Control) Act, 1949, received the Royal Assent on June 2, 1949, and, since no other date is appointed for it to come into operation, it came into operation on that day.

My article in the March issue of *The Conveyancer* described the Bill in the form in which it emerged from the Committee stage in the House of Commons. The purpose of the present note is simply to call attention to the principal changes made in the Bill during its subsequent passage through Parliament.

No fundamental change has been made in the structure of the provisions described in the earlier article. A number of drafting improvements and a few amendments of substance were, however, incorporated in the Bill at the report stage in the Commons and in the course of its examination by the Lords.

Form of the Act

The First Schedule to the Act gathers together the transitional provisions relating to premiums paid before the commencement of the Act, which in the earlier prints of the Bill were to be found set out in the clauses. This is an improvement in form. These transitional provisions are the most complex in the Act. Part I of the Schedule deals with the provisions for the limitation of rent chargeable by the present landlord or for the recovery of a lump sum from the landlord's predecessor in title (as the case may be) where section 1 applies and a premium was taken before the commencement of the Act in respect of the grant, continuance or renewal of a tenancy. Part II deals with the provisions which enable an assignor in certain circumstances to recover, in spite of the prohibition of premiums contained in section 2, from the assignee a proportion of a premium lawfully paid by the assignor before the commencement of the Act in respect of the grant, continuance or renewal of a tenancy. Part III of the Schedule contains definitive and supplementary matter.

Premiums Paid to the Landlord's Predecessor in Title

In its original form the Bill contained provisions for the limitation of rent (where an application had been made under section 1 and a premium was paid before the commencement of the Act in respect of the grant of a tenancy) which drew no distinction between cases where the premium had been paid to the present landlord and cases where the premium had been paid to his predecessor in title. This was obviously unjust to the present landlord if in fact the reversion had been assigned after the premium had been paid; the present landlord had not received the premium but the rent payable to him was to be reduced. This anomaly has been removed. In cases where the reversion has been assigned since the premium was paid but before March 25, 1949, the adjustment is made, not by way of limitation of rent, but by way of recovery of a lump sum from the person to whom the premium was actually paid. The formula which is laid down enables the tenant to recover the same amount in a lump sum from the landlord's predecessor as he could recover by way of reduced rent over the relevant period if the premium had been paid to his present landlord. There is not space to go into details of the formula in this note. It is worth mentioning, however, that the formula provides for the calculation of a lump sum both where the existing rent is equal to or greater than the reasonable rent as determined by the Tribunal and where it is less. This makes it clear that the Tribunal may *determine* a reasonable rent which is *greater* than the existing rent. Such a determination is nugatory for the purposes of section 1; the Tribunal cannot increase the existing rent but can only reduce it. It is not, however, ineffective for all purposes, since it may be material for the purpose of the adjustments described in the First Schedule.

In cases where the premium has been paid to the landlord's predecessor in title, so that a claim to recover a lump sum arises against him, the provisions in Part II of the First Schedule, which enable an assignor to pass on to the assignee a proportionate part of the premium, require qualification. If they were not qualified it would mean that the assignor would be in a position to recover part of the premium twice, once from the payee and once from the assignee. Paragraph 5 (3) of the First Schedule introduces the necessary qualification, so that such a double right of recovery is excluded.

Sharing of Accommodation: Additional Provisions

Two amendments of importance were made in the provisions relating to the sharing of accommodation. The first added a new sub-section to section 8—a difficult section. The new sub-section (sub-section (7)) provides that, subject to one qualification, no order can be made for the recovery of any of the shared accommodation, whether "living" accommodation in the sense of the *Neale* v. *Del Soto* line of decisions or not, unless at the same time, or previously, a like order is, or has been, made for the recovery of the separate accommodation. Section 8, it may be recalled, deals with the sharing of accommodation between the tenant and other persons, not including the landlord, and the solution it provides for the sharing problem is that the *separate* accommodation (*i.e.*, the accommodation exclusively occupied as distinct from the

shared accommodation) is to be deemed to be a dwelling-house within the principal Acts. It will be noted that it is only the separate accommodation which is thus deemed to fall within the Acts. In the absence of some further provision, therefore, the landlord might render the protection given to the separate accommodation valueless, or at any rate much less valuable, by terminating the tenant's rights over the shared accommodation. The termination of the tenant's right to make use of a shared kitchen, or a shared bathroom or W.C., might drive him to relinquish the separate accommodation. The new sub-section provides against this contingency. The qualification mentioned above is that the county court may, although no order has been or is being made as to the separate accommodation, make an order terminating the tenant's rights in relation to shared non-living accommodation, or (subject to certain limitations) modifying his rights in relation to shared living accommodation, provided that there is an express provision in the contract enabling the landlord to do so.

The other amendment of substance is the introduction of a new section (section 9) for the purpose of reversing the effect of the recent decision of the Court of Appeal in *Turner* v. *Baker*, [1949] 1 All E. R. 560. In that case the tenant of a dwelling-house to which the principal Acts applied sublet one room furnished and allowed the sub-tenant to share with her the use of the kitchen. The Court of Appeal held, affirming the decision of the county court Judge, that the landlord was entitled to possession of the whole premises, not merely the part sub-let furnished, since the sharing arrangement between the tenant and the sub-tenant prevented the dwelling-house or any part of it from being let as a separate dwelling-house within the meaning of the Acts. The fact that the landlord was not a party or privy to the sharing arrangement was immaterial. Section 9 reverses the effect of this decision. It provides that where the tenant of any premises had sublet a part but not the whole of the premises he will not lose the protection of the principal Acts as against his landlord merely because (1) part of the premises has been sublet furnished, or (2) part of the premises has been let on the basis of a sharing arrangement between the tenant and a sub-tenant or between two or more sub-tenants. It will be observed that section 9 only applies where *part* of the premises, not the whole, has been sub-let. Thus the decision in *Prout* v. *Hunter*, [1924] 2 K. B. 736, is unaffected, although that in *Barrell* v. *Fordree*, [1932] A. C. 676, is reversed.

Conclusion

Among drafting improvements made to the Bill in the course of its Parliamentary career is the amendment of section 2 (3), which makes it clear that the prohibition of premiums does not apply to a tenancy where the rent is less than two-thirds of the rateable value. This enables the ground leases of dwelling-houses within the Acts to be sold without offending against section 2. It is obvious that it also opens the door to evasion of the Act, but no doubt Parliament will intervene again if there is evidence of any widespread evasion.

The Act as passed is a short statute of eighteen sections and two

schedules. Practitioners will find, however, when they come to study it in detail that the complexity of its provisions bears no relation to its size.

Publishers' Note

A "Current Law" Guide to the Landlord and Tenant (Rent Control) Bill, by Mr. Muir Watt, will be published in July.

RETENTION OF TRUST INCOME AND THE LIMITATION ACT, 1939

By A. K. R. Kiralfy, LL.M., Barrister-at-Law

The Limitation Act of 1939, s. 19, precludes a trustee from pleading lapse of time where trust "property" or the proceeds thereof are in his possession or have been received by him and converted to his use. This provision clearly covers the case of retention of the "corpus" of trust assets or a trust fund. Does it not equally apply to the retention of instalments of income of a trust actually received by a trustee and retained or converted by him? In view of the wide interpretation of "trust property" in equity this proposition appears incontestable in principle. But several treatises seem to maintain the contrary and introduce a novel rule. Thus Dr. Hanbury (*Modern Equity*, 4th ed., p. 343) holds that the statutory provision "applies only in cases in which the *cestui que trust* is suing to recover land or the capital of a trust fund. It does not apply in cases in which the income is the subject of the suit". In the case of income the learned author holds that lapse of time is always a defence (*ib.* p. 346). The only authority cited for this proposition is *Re Robinson*, [1911] 1 Ch. 502, which was a case of negligent misapplication and irrelevant to the instant point. Some apparent, but probably unintended, confirmation of the proposition might be found in the general observations in *Underhill on Trusts*, 9th ed., p. 525.

It is submitted that in fact mesne rents and profits can be recovered without limitation of time so long as the trust property is still in the trustee's possession (*Lewin on Trusts*, 14th ed., p. 853). There is no clear decision on this subject, but the fact that a trustee must account for all trust income actually retained by him or converted to his own use appears to be supported indirectly by several decisions.

An example of this problem is afforded by the case of *Blogg* v. *Johnson* (1867), L. R. 2 Ch. 225. John Johnson died in 1848 leaving a life interest in income to his widow Mary. The defendant trustee did not pay the full income to Mary. Mary died, appointing the plaintiff her executor. The defendant was ordered to pay the balance of the income due since 1848. The Court held that the plaintiff's claim was founded "upon the improper retention by the defendant of a sum of money due to the estate of Mary Johnson". Here there had been part

payment, but the point was raised more directly in *Sturgis* v. *Morse* (1860), 3 De G. & J. 1. The trustee had taken a conveyance in 1831 with notice of a prior trust. In 1853 he was made accountable for all mesne profits. Knight-Bruce, L.J., explained (at p. 11): "The statute has, I think, no application with regard to the 'corpus' of the estate. The same circumstance renders it impossible, as I view the facts and the law, to give effect to the claim for a limitation of the account of rents. The rents have been received in effect by trustees or a trustee and they must be accounted for accordingly".

The arguments in *Re Jane Davis*, [1891] 3 Ch. 119, clearly assume this to be the rule. In that case an executor received income of a residuary estate from 1857 to 1888. The Court in fact limited his liability to account to twelve years' arrears, but the principle of the decision was that the defendant was not an express trustee. Had he assented to the legacy or been appointed a trustee by the will he would, the arguments assumed, have been liable to account for the entire thirty years' income. Lindley, L.J., pointed out, "An executor cannot be deprived of the benefit of the statute by showing that he is a trustee; it is necessary to make out that he is an express trustee". The statute referred to was the Real Property Limitation Act, 1874, s. 8, now Limitation Act, 1939, s. 20.

That the term "property" in the Limitation Act, 1939, s. 19 (1), includes instalments of income appears from a Privy Council decision in *Cheang Thye Phin* v. *Lam Kin Sang* [1929] A. C. 670. Their Lordships had there to deal with a Straits Settlements Limitation Ordinance which provided a twelve year period of limitation for claims to "a share of the property of an intestate". A testator had left certain shares of income undisposed of, so that they passed as on intestacy. The plaintiff's claim was therefore exclusively one for income. The local Court had held that the Ordinance applied to the plaintiff's claim and the Privy Council clearly agreed; see, especially, the judgment of Lord Warrington at p. 672.

Why are there not more decisions in this field? The following tentative suggestion may be advanced. It is not uncommon for trustees who convert trust "capital" to pay a corresponding income to the beneficiaries to conceal the commission of the breach of trust. In many cases the trustee is himself the life tenant and the breach is only revealed when he dies. To refer to two well-known cases, in *Re Hallett's Estate* (1879), 13 Ch. D. 696, at 701, it is stated in the report that the income on the trust fund had been paid to the beneficiary. In *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, it is stated that interest was paid on the investments until the life beneficiary died.

To limit the interpretation of the word "property" to "capital" or "corpus" is not only inconsistent with these admittedly unfamiliar cases. It is also inconsistent with many applications of equitable principles. Thus a rent-collector has been referred to as a trustee; *per* Jessel, M.R., in *Re Hallett*, *supra*, 709. In the case of *Bennett* v. *Gas Light & Coke Co.* (1882), 52 L. J. Ch. 98, an agency agreement renewed by trustees was held to be an asset to be distributed according to the terms of the trust. But as it merely conferred a right to certain commissions on transactions negotiated by the trustees it had an "income nature".

THE STRICT COMMON LAW RULES OF WASTE AND THEIR APPARENT MODIFICATION

By M. E. Bathurst, C.B.E., LL.B., Solicitor

A. Introduction

The object of the rules composing the law of waste and the criteria for testing their social usefulness have been well stated in the following words (*a*):

> The law of waste is a part of the regulations of the relations between persons who simultaneously have interests in the same thing. Normally one of these persons has possession and the others are out of possession. Such a circumstance requires that the one in possession be forbidden such action as will diminish the market value of the other interests; and that he be required to act fairly in the maintenance of the property by the payment of current charges and the prevention of its deterioration. The regulation goes further and restricts, to some extent, the power of the person in possession to make " changes " in the premises. All of these detailed rules have a single underlying justification or objective which is to assure to each person, in a split ownership, the accomplishment of his reasonable desires to the largest extent that is consistent with the reasonable protection of the other interests. This is the criterion by which any detail of the existing law of waste should be tested. The owner of the possessory interest is to be curtailed in his behaviour only to the extent necessary for the reasonable protection of the other interests in the same thing. When a rule of law goes beyond this it has departed from the social justification for this part of our law.

It is said that waste at common law includes not only acts which deteriorate the value of the land (*b*), but those which change its character (*c*). However, there must be something more than trivial damage to the inheritance before the consequences of waste attach (*d*). The damage may take the following forms: (1) diminution of the value of the estate; (2) increase in the burden thereon (as by increasing the cost of future repairs); (3) impairment of the evidence of title (*e*). It

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(*a*) New York Legislative Document No. 60 G (1935), 45, 46; REPORT OF THE LAW REVISION COMMISSION, STATE OF NEW YORK (1935), 389, 390.

(*b*) *Doe* d. *Darlington* v. *Bond*, 5 B. & C. 855, 108 Eng. Rep. 318 (K. B. 1826), See *Barret* v. *Barret*, Het. 34, 35, 124 Eng. Rep. 321, 322 (C. P. 1628).

(*c*) *Lord Darcy* v. *Askwith*, Hob. 234, 80 Eng. Rep. 380 (K. B. 1618); *Simmons* v. *Norton*, 9 L. J. (o.s.) C. P. 185 (1831).

(*d*) *Keepers of Harrow School* v. *Alderton*, 2 B. & P. 86, 126 Eng. Rep. 1170 (C. P. 1800); *Mollineux* v. *Powell*, 3 P. Wms. 268, n. 2, 24 Eng. Rep. 1059 (Ch. 1730); *Barry* v. *Barry*, 1 Jac. & W. 651, 37 Eng. Rep. 516 (Ch. 1820); *Hyman* v. *Rose*, [1912] A. C. 623; 2 Roll. Abr. 824.

(*e*) *Doe* d. *Grubb* v. *Earl of Burlington*, 5 B. & Ad. 507, 517, 110 Eng. Rep. 878, 882 (K. B. 1833); *Keepers of Harrow School* v. *Alderton*, 2 B. & P. 86, 126 Eng. Rep. 1170 (C. P. 1800); *Huntley* v. *Russell*, 13 Q. B. D. 572, 116 Eng. Rep. 1381 (1849); *Tucker* v. *Linger*, 21 Ch. Div. 18, 29 (1882), *affd.* 8 App. Cas. 508 (1883); 2 Roll. Abr. 815.

follows that an act, such as making structural alterations, may be waste if it injures the inheritance in either the second or third of the above ways. This type of waste, consisting of affirmative acts, is designated voluntary waste to distinguish it from permissive waste which consists in omission only (*f*). Voluntary waste may injure the inheritance and at the same time increase the capital value of the land. If this occurs, the waste is referred to as meliorating, ameliorating, or ameliorative (*g*). Meliorating waste may be defined as voluntary waste which improves the demised or settled premises.

The purpose of this article is to trace the growth of the modern English rules on meliorating waste. At the present day, no injunction will be granted unless substantial damage and prejudice to the inheritance are shown. In other words, equity will not restrain trivial waste or, *a fortiori*, waste which it regards as meliorating (*h*). At law, if nominal damages only are awarded by the jury, judgment is entered for the defendant (*i*).

B. Liability of Limited Owners at Common Law

Coke's statements are generally interpreted as establishing the rule that at common law tenants holding conventional life estates and tenants for years were not liable for waste (*k*). The stated reason is that "they come in by the act of the (settlor or) lessor and he might have provided . . . against waste . . . and he that might and would not provide for himself, the common law would not provide for" (*l*). These statements are, however, taken by some writers (*m*) to refer merely to the fact that the writ of waste did not lie against such tenants before the Statute of Gloucester (*n*). It is argued that Coke was referring not to

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(*f*) Co. Litt. 53; 2 Inst. 145; *Wood's Inst.* (7th ed. 1745), 319; Bac. Abr. tit. Waste, B.

(*g*) Tiffany, *Law of Landlord and Tenant* (1912), 705, 706; Woodfall, *Law of Landlord and Tenant* (23rd ed. 1934), 783.

(*h*) *Doherty* v. *Allman*, 3 App. Cas. 709 (1878); *Jones* v. *Chappell*, L. R. 20 Eq. 539, 541 (1875); *Re M'Intosh*, 61 L. J. Q. B. 164 (1891); *Meux* v. *Cobley*, [1892] 2 Ch. D. 253; *Mollineux* v. *Powell*, 3 P. Wms. 268, n. 2, 24 Eng. Rep. 1059 (Ch. 1730); cf. *Hyman* v. *Rose*, [1912] A. C. 623, 638; *Brooke* v. *Mernagh*, L. R. 23 Ir. 86 (Ch. 1888); *Brooke* v. *Kavanagh*, *id.* 97 (Ch. 1888); *Steele* v. *Tiernan*, *id.* 583 (Ch. 1889); *Grand Canal Co.* v. *M'Namee*, L. R. 29 Ir. (C. A. 1891); cf. *Maunsell* v. *Hort*, 11 Ir. R. Eq. 478, 491, 492 (1877); Bewes, *Law of Waste* (1894), 133.

(*i*) *Doe* d. *Grubb* v. *Earl of Burlington*, 5 B. & Ad. 507, 110 Eng. Rep. 878 (K. B. (1833); *Keepers of Harrow School* v. *Alderton*, 2 B. & P. 86, 126 Eng. Rep. 1170 (C. P. 1800). This extraordinary jurisdiction, peculiar to waste (Winfield, *Textbook of the Law of Tort* (4th ed.), 147, n. *t.*), was described by Lord O'Hagan in *Doherty* v. *Allman*, 3 App. Cas. 709, 725 (1878), as an equitable jurisdiction exercised by a Court of law. The desire to avoid forfeiture probably prompted the judicial creation of this jurisdiction, but the fact that the injury was nominal would seem to show that there was no actionable waste: *Rigg* v. *Parsons* (Lancaster Assizes, 1801), cited in *Pindar* v. *Wadsworth*, 2 East 154, 156 (K. B. 1802); *Sheppard* v. *Sheppard*, 3 N. C. (2 Hayw.) 382 (1806), is an American authority for this jurisdiction.

(*k*) Co. Litt. 53a, 54b; 2 Inst. 145, 299, 301; *Lewis Bowles' Case*, 11 Co. Rep. 79, 81, 82 (K. B. 1615). This view is also taken in Fitz. Nat. Brev. 55; 2 Swanst. 145, n. 6, 36 Eng. Rep. 573; 2 *Doctor and Student* (18th ed. 1792), 102; 2 Bl. Comm. *282; Bewes, *op. cit.*, 1, 2; cf. 2 Pollock and Maitland, *History of English Law* (2nd ed. 1905), 9.

(*l*) 2 Inst. 145; see also *id.* 299.

(*m*) Kirchwey, *Liability for Waste* (1908), 8 Col. L. Rev. 425; 1 Reeves, *History of English Law* (2nd ed. 1787), 386; 2 *id.* 73, 148 n.; 2 Pollock and Maitland, *op. cit.* 9; 4 Kent, Comm. *79, 80. *Contra*: Story, *Equity Jurisprudence* (9th ed. 1866), s. 909, n. 3.

(*n*) 6 Edw. I, c. 5 (1278).

the legal quality of the act but to the remedy available after its commission. Thus, in *Lewis Bowles' Case* (*o*), Coke stated that the action for waste was not available at common law against lessees; they first became subject to the action under the Statute of Marlbridge (*p*). By quoting from Bracton he indicates that he speaks of the remedy only. The quoted passage (*q*) defines the rights of a conventional tenant for life; Coke adds (*r*) that this "proves directly that it was a wrong in the lessee for life to do waste or destruction at the Common Law". Professor G. W. Kirchwey has suggested (*s*) that the lessee who had committed waste had no remedy against the lessor. For example, he could not recover possession if he was evicted for abuse of his rights. He could be disseised or dispossessed by any interested person and the land withheld until full recompense and full security against further waste (*t*) had been provided. Kent points out (*u*) that if conventional life tenants cut timber, it became the property of the owner of the inheritance. The words "without impeachment for waste" in the instrument creating the estate (*x*) resulted in transfer to the tenant of property in the timber. It also afforded a defence to an action of trover or of waste (*y*). The words *absque impetitione vasti per aliquod breve de vasto* only exempted the tenant from liability to an action for waste (*z*). In such event the property in the felled trees would not pass to the tenant and the owner of the inheritance might seize them (*a*).

(*o*) 11 Co. Rep. 79, 82 (K. B. 1615).
(*p*) 52 Hen. III, c. 23 (1267).
(*q*) Bract. f. 217.
(*r*) 11 Co. Rep. 79, 82 (K. B. 1615).
(*s*) Kirchwey, *supra*, note (*m*), at 426.
(*t*) *Id.* at 427, citing Bract. f. 169, 217; Britt. 113b.
(*u*) *Commentaries*, *78.
(*x*) It is clear from the Statute of Marlbridge, 1267, 52 Hen. III, c. 23, that the landlord could permit waste. From early times there have been tenants for life without impeachment for waste: Y. B. 12 and 13 Edw. III (Rolls Ser.) 166; *Lewis Bowles' Case*, 11 Co. Rep. 79 (K. B. 1615); Co. Litt. 220a. Equity applied this exemption to equitable tenants for life (*Aspinall* v. *Leigh*, 2 Vern. 218, 23 Eng. Rep. 741 (Ch. 1690)), but also prevented the commission of "equitable waste"—the taking of an unconscientious or inequitable advantage of this license, to the destruction of the thing settled: *Vane* v. *Lord Barnard*, 2 Vern. 738, 23 Eng. Rep. 1082 (Ch. 1716); *Rolt* v. *Lord Somerville*, 2 Eq. Cas. Abr. tit. Waste, pl. 8, 22 Eng. Rep. 644 (1737); *Tracy* v. *Tracy*, 1 Vern. 23, n., 23 Eng. Rep. 278 (Ch. 1681); and *Piers* v. *Piers*, 1 Ves. Sen. 521, 27 Eng. Rep. 1180 (Ch. 1750). It was provided by Supreme Court of Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25 (3), now Law of Property Act, 1925, 15 Geo. 5, c. 20, s. 135, that a tenant for life has no right to commit equitable waste unless an intention to confer such right appears in the instrument of creation. On unimpeachability for waste and equitable waste, see Bewes, *op. cit.* 147 *et seq.*; Bisset, *Estates for Life* (1842), c. 13, s. 2; 3 Holdsworth, *History of English Law* (3rd ed. 1927), 123; Kerr, *Injunctions* (6th ed. 1927), 72 *et seq.*; 2 Vaizey, *Law of Settlements of Property* (1887), c. 11, ss. 13, 14; Yool, *Essay on Waste* (1863), 15–17.
(*y*) *Lewis Bowles' Case*, 11 Co. Rep. 79, 82b (K. B. 1615): "This clause . . . gives a power to the lessee which will produce an interest in him if he executes his power during the privity of his estate". Co. Litt. 220a; *Anon.* Mos. 237, 25 Eng. Rep. 368 (Ch. 1729); *Pyne* v. *Dor*, 1 Term. Rep. 55, 99 Eng. Rep. 968 (K. B. 1785); *Wolf* v. *Hill*, 2 Swanst. 149 n., 36 Eng. Rep. 575 (Ch. 1806); *Bridges* v. *Stephens*, *id.* 150 n., 36 Eng. Rep. 575 (Ch. 1817).
(*z*) In *Anon.*, Moo. K. B. 18, pl. 64, 72 Eng. Rep. 410 (1560), a covenant not to bring an action within two years was said not to make the tenant unimpeachable. Compare the suspension of the lessee's waste liability until it is known that he will not exercise an option to purchase the fee conferred by the lease. *Keogh* v. *Peck*, 316 Ill. 318, 147 N. E. 266 (1925), noted in 39 Harv. L. Rev. 135 (1925); *Powell* v. *Dayton, etc., Ry.*, 16 Or. 33, 16 Pac. 863 (1888).
(*a*) *Lewis Bowles' Case*, 11 Co. Rep. 79, 83b (K. B. 1615); Litt. 82, s. 352; *Davis* v. *Marlborough*, 3 Swanst. 108, 145, n. 6, 36 Eng. Rep. 555, 573 (Ch. 1819).

It is clear that after a royal prohibition (*b*) to a conventional life tenant (*c*) forbidding the commission of waste, the action of waste would lie against him (*d*). As Professor H. D. Hazeltine points out (*e*), in twelve of the twenty-six cases on waste in Bracton's Notebook the writ of prohibition first issued, and, later, on disregard of the prohibition, the aggrieved party brought the writ of waste (*f*). In the other fourteen, the writ of waste appears to have been brought initially (*g*). Professor Hazeltine does not classify the actions further, but it is important for the present discussion to note that the fourteen cases included two in which conventional life tenants were defendants and two in which the action was against tenants for years (*h*).

Therefore, the nature of the common law remedy for waste available against a conventional life tenant is in doubt. The liability of such a tenant for waste seems clear.

The Provisions of Westminster, 1259 (*i*), made tenants for years liable for waste. The Statute of Marlbridge (*k*) re-enacted this provision and forbade the tenant (*firmarius*) to commit waste '*nisi specialem inde habuerit concessionem*'. The Statute of Gloucester (*l*) provided that:

> a Man from henceforth shall have a Writ of Waste in the Chancery against him that holdeth . . . for Term of Life (*m*) or for Term of Years . . . And he which shall be attainted of Waste, shall lose the Thing that he hath wasted, and moreover shall recompense thrice so much as the Waste shall be taxed at.

Another statute (*n*) was necessary to make it clear that this liability existed even though no royal prohibition had been directed to the tenant.

The remedy against the particular tenant is either preventive—the writ of estrepment—or remedial—the action of waste (*o*). The latter was either in the *tenuit* or in the *tenet*. If the lease had expired, the action was in the *tenuit* for treble damages; in the *tenet*, when brought for treble damages and the recovery of possession (*p*).

(*b*) The writ of prohibition was, temp. Henry III, so developed that it did work analogous to that done by the modern injunction, temporary and perpetual; 2 Holdsworth, *op. cit.* (2nd ed. 1923), 248. These writs were ordinarily addressed to the sheriff but they could be addressed to the parties: *id.* 249.

(*c*) Bract. N. B. 443 and 540 (life); 607, 1304, 1371 (years).

(*d*) Hazeltine, *The Early History of Equity*, Essays in Legal History (1913), 273, 274; 2 Pollock and Maitland, *op. cit.* 9, citing Bract. f. 315, 316b; Bract. N. B. 574.

(*e*) *Op. cit.* 274.

(*f*) Bract. N. B. 27, 56, 388, 580, 632, 640, 718, 739, 880, 1075, 1371, 1617.

(*g*) *Id.* 115, 443, 461, 485, 527, 540, 574, 607, 691, 717, 1131, 1165, 1304, 1743.

(*h*) *Id.* 443 and 540 (same parties) as to life tenants and 607 and 1304 as to tenants for years.

(*i*) S. 20.

(*k*) 52 Hen. III, c. 23 (1267).

(*l*) 6 Edw. I, c. 5 (1278).

(*m*) Extended to equitable life estates in 1433; 11 Hen. VI, c. 5.

(*n*) Statute of Westminster II, 1285, 13 Edw. I, c. 14; 3 Holdsworth, *op. cit.* 122. It seems that the writ of prohibition, for which a writ of summons was hereby substituted, was that addressed to the party, and that the writ addressed to the sheriff remained available; see *per* Eyre, C.J., in *Jefferson* v. *Bishop of Durham*, 1 Bos. & Pull. 105, 121, 122, 126 Eng. Rep. 804, 813 (C. P. 1796).

(*o*) Hale, *Analysis of the Law* (1713), s. xlii, 127, 128.

(*p*) *Cole* v. *Greene*, 2 Wms. Saund. 252, 85 Eng. Rep. 1037; s.c. *sub nom. Cole* v. *Green*, 1 Lev. 309, 83 Eng. Rep. 422, and *sub nom. Cole* v. *Forth*, 1 Mod. 94, 86 Eng. Rep. 759 (K. B. 1671).

The writ of estrepment lay after judgment in a real action and before the sheriff delivered possession. Its object was to prevent waste which the unsuccessful party might be tempted to commit on lands determined to be no longer his (*q*). To prevent waste by a tenant pending a suit touching the existence of his interest, the Statute of Gloucester (*r*) provided another writ of estrepment, *pendente placito* (*s*). Injunctions were first issued to restrain legal waste at the beginning of the eighteenth century. According to Ames (*t*), *Horner* v. *Popham* (*u*), decided in 1701, is the earliest reported case.

The abolition of the action of waste in 1833 (*x*) and the repeal of the Statute of Gloucester (*y*) in 1879 (*z*) came long after the writ of waste had ceased to be commonly used. An action on the case, in the nature of an action of waste, had been found simpler and more effectual. Only an owner of an estate of inheritance in immediate reversion could obtain the writ of waste. Although the property wasted could be recovered under the writ, the proceedings were so cumbrous and technical that they often failed. Successful proceedings usually recovered only the particular spot where the waste was committed. In leases for years or for lives, a covenant against waste, with a power of re-entry on breach, had been found to be the practical means of recovering the whole property demised. The action on the case could be brought by a tenant for life or years, whether in immediate reversion or not. A writ of waste did not generally carry costs, but the plaintiff obtained them in an action on the case (*a*). Holdsworth states that the attitude of the Chancery was partially responsible for the common law courts' allowing Case in place of the defective action of waste (*b*).

If, as some believe (*c*), the waste liability of conventional tenants for life originated in their subjection to the writ of waste by the Statute of Gloucester (*d*), justification must be sought for continuance of this liability after the statute was repealed (*e*). This liability can be explained on any one of the following bases :

(1) Liability at common law. The first of these matters has already been discussed (*f*).

(2) Inclusion of life tenants within the term " firmarii " in the Statute of Marlbridge (*g*). According to Coke (*h*), the word " firmarii " in the statute (" all fermors during their terms shall not make waste ") includes all who hold by lease for life, lives, or years.

(*q*) 2 Inst. 238.
(*r*) 6 Edw. I, c. 5 (1278).
(*s*) 3 Bl. Comm. *225, 226. On this writ generally, see *id.* Bk. 3, c. 14, and Hazeltine, *op. cit.* 276–278.
(*t*) 1 Ames, *Cases in Equity Jurisdiction* (1901), 460.
(*u*) Colles 1, 8, 1 Eng. Rep. 150, 153 (H. L. 1701). See Chafee, *Cases on Equitable Relief Against Torts* (1924), 7, for the early history of waste in Chancery.
(*x*) Real Property Limitation Act, 1833, 3 & 4 Wm. IV, c. 27, s. 36.
(*y*) 6 Edw. I, c. 5 (1278).
(*z*) Civil Procedure Acts Repeal Act, 1879, 42 & 43 Vict. c. 59, s. 2, Schedule.
(*a*) See note to *Cole* v. *Greene*, 2 Wms. Saund. 252, 85 Eng. Rep. 1037 (K. B. 1671), upon which this comparison is based.
(*b*) 7 Holdsworth, *op. cit.* (1926), 280.
(*c*) *Supra*, note (*m*), p. 279.
(*d*) 6 Edw. I, c. 5 (1278).
(*e*) 42 & 43 Vict. c. 59 (1879).
(*f*) *Supra*, pp. 279–281
(*g*) 52 Hen. III, c. 23 (1267).
(*h*) 2 Inst. 145.

He quotes Bracton's statement (*i*) that the word "terminus" is to be liberally construed to include both terms of life and years. This is correct. Bracton, however, limits "firmarius" to one who holds a tenement for years, and refers to the firmarius and the freehold tenant as mutually exclusive categories. It seems clear that the statute applied only to tenants for years (*k*).

(3) Continued liability of life tenants after repeal of the Statute of Gloucester (*l*) is probably a consequence of the Common Law Procedure Act, 1852 (*m*). By this Act no precise form of action is necessary in a writ of summons. Pollock suggests (*n*) that after abolition of the old forms of action the action for waste is one in contract, not in tort. This is contrary to authority (*o*).

C. The Strict Rule at Common Law

Before embarking upon a detailed discussion of the common law and equity rules on meliorating waste, it is desirable to consider briefly the exceptions to the strict rules of waste (*p*). These exceptions arise from local custom, the triviality of the damage to the inheritance, and the adaptation of the premises to the use for which they are leased.

Local custom has no application to waste committed by structurally altering buildings. It usually, though not invariably, exempts certain species of trees from application of the rules which prohibit felling timber (*q*).

(*i*) Bract. f. 318b.

(*k*) Kirchwey, *supra*, note (*m*), p. 433. *Contra*: 2 Inst. 145, n. 1.

(*l*) 6 Edw. I, c. 5 (1278).

(*m*) 15 & 16 Vict. c. 76 (1852). See Craig, *Legal and Equitable Rights and Liabilities as to Trees and Woods* (1866), 155.

(*n*) *Law of Torts* (12th ed. 1923), 359; see also Farrer, "Is Waste against Termor for Life or Years based upon Contract or Tort?" 15 Conv. (1929–30) 29, 37.

(*o*) *Defries* v. *Milne*, [1913] 1 Ch. 98 (C. A.), noted in 134 L. T. 26, 254 (1912); see *Moore* v. *Townsend*, 33 N. J. L. 284, 307; *Cohen* v. *Reif*, 223 Ky. 603, 4 S. W. (2*d*) 388 (1928); cf. *Marsden* v. *Edward Heyes, Ltd.*, [1927] 2 K. B. 1, 8 (C. A. 1926); Winfield, *Province of the Law of Tort* (1931), 211; "Controversies about the Action for Waste" (1939), 83 S. J. 251.

(*p*) No further discussion of unimpeachability for waste is thought necessary here. See *supra*, note (*x*), p. 280. It is, however, convenient to note that if an alteration constitutes an improvement from the point of view of the lessee, then a covenant against alterations without the lessor's previous consent is subject to a statutorily inserted proviso. By s. 19 (2) of the Landlord and Tenant Act, 1927, 17 & 18 Geo. V, c. 36, the landlord may not unreasonably withhold his consent to the improvement. See *F. W. Woolworth & Co.* v. *Lambert*, [1937] Ch. 37; *Lambert* v. *F. W. Woolworth & Co.* (*No.* 2), [1938] Ch. 883 (C. A.). The onus is on the tenant to show the withholding of consent is unreasonable. But if the lessor refused consent but gave no reasons, the onus is upon him to show his action was reasonable; *Lambert* v. *F. W. Woolworth & Co.*, *supra*, *per* Slesser, L.J. at 906. This sub-section has no application to leases of agricultural holdings or of mines (s. 19 (4)) or to covenants prohibiting all alterations. It applies in other cases whenever the lease was made: s. 19 (2). *Lilley & Skinner* v. *Crump*, 73 S. J. 366 (1929). As to what is an "improvement", see *Balls Bros.* v. *Sinclair*, [1931] 2 Ch. 325; *Lambert* v. *F. W. Woolworth & Co.*, *supra*. The landlord may, as a condition of the consent, require the lessee to pay a reasonable sum for any damage to or diminution in value of the premises or any neighbouring premises of his, and for the legal expenses properly incurred in connection with the licence: s. 19 (2). He may, if the improvement does not add to the letting value of the premises, require that the lessee undertake to reinstate the premises, if it is reasonable so to require: *ibid.*

(*q*) *Countess of Cumberland's Case*, Moo. K. B. 812, 72 Eng. Rep. 922 (1610); *Tucker* v. *Linger*, 21 Ch. Div. 18 (1882), affd. 8 App. Cas. 508 (1883); *Dashwood* v. *Magniac*, [1891] 3 Ch. 306.

Injury to or destruction of buildings occasioned through reasonable and proper use by the lessee is not waste. A tenant is entitled to assume that the premises will withstand use for the purpose for which they were let (*r*).

In 1312 Bereford, C.J., held (*s*) that trivial damage will not sustain an action of waste:

> It would be fine law were we to rule the abatement of a house worth twelve pence to be waste in a messuage, and of a couple of apple trees worth sixpence to be waste in a garden. We will not do it.

If a tenant exceeded the measure prescribed by a reasonable estover (*t*), he encroached upon the *proprietas* with a resultant liability for waste, unless it was too trivial to warrant an inquisition (*u*). Local custom determined the magnitude necessary for the tenant's act to become an object of judicial inquiry (*x*). At the present day, a rule peculiar to waste (*y*) provides that the award of nominal damages to the plaintiff entitled the defendant to judgment (*z*). Equity will not enjoin trivial waste (*a*).

According to Holdsworth, there is a clear decision in Edward III's reign that acts which improve the value of the property are not waste (*b*). The action, however, was an assize of novel disseisin. No reason is given for the right of the reversioner to recover possession. It may have been waste which so entitled him. Holdsworth's certainty about the decision of the case is questionable. Even assuming that forfeiture could be enforced for commission of waste, the assize of novel disseisin would not seem the appropriate remedy. In any event, later decisions make it clear that acts which improve the property from the tenant's point of view may constitute waste if they injure the reversionary interest (*c*). This view was rigidly adhered to in the seventeenth century. The reasons given were twofold. A structural improvement increased the burden on the property, for example, by adding to the cost of repair. Furthermore, conversion of the premises into something different in kind from those described in the title deeds might seriously hamper proof of the landlord's title, for example, in a subsequent ejectment action (*d*). Moreover, it was feared that the person might use his act of alteration as evidence supporting a claim to an estate greater than he had (*e*).

(*r*) *Saner* v. *Bilton*, 7 Ch. Div. 815 (1878); *Manchester Bonded Warehouse* v. *Carr*, 5 C. P. D. 507 (1880).

(*s*) Y. B. 5 Edw. II (Selden Soc.) 247.

(*t*) A tenant for life or years, or from year to year may cut and appropriate as "estovers" or "botes" a reasonable quantity of timber for certain immediately necessary purposes. These purposes are repair of buildings, fences, gates, implements of husbandry, etc., and provision of fuel in his houses and in houses occupied by his servants. Tiffany, *Real Property* (Abridged ed. 1940), 434; Restatement, *Property* (1936), s. 143; Cheshire, *Modern Law of Real Property* (4th ed. 1937), 165, 382.

(*u*) 1 Reeves, *op. cit.* 386.

(*x*) Bract. f. 316b.

(*y*) Winfield, *Textbook of the Law of Tort* (4th ed.), 147, note *t*.

(*z*) See cases cited *supra*, note (*i*), p. 279.

(*a*) See cases cited *supra*, note (*h*), p. 279.

(*b*) Y. B. 14 Edw. III (Rolls Ser.) 168, 170.

(*c*) *Maleverer* v. *Spinks*, 1 Dyer 35b, 36b, 73 Eng. Rep. 79, 81 (K. B. 1538); 2 Roll. Abr. 814, 815, pl. 8. Cf. *Anon.* 2 Leo. 174, 74 Eng. Rep. 454 (C. P. 1587).

(*d*) See *Huntley* v. *Russell*, 13 Q. B. D. 572, 116 Eng. Rep. 1381 (1849); *Simmons* v. *Norton*, 9 L. J. (o.s.) C. P. 185 (1831).

(*e*) *Meliorating Waste* (1873), 17 S. J. 667.

Other reasons were advanced for the strict rule. It is said that a lease confers the right to use the premises and not to alter them. It entitles the landlord to the return at the end of the term of the identical property that he leased (*f*). In other words, the tenant in fee simple is the final arbiter of what permanent changes should be made on the land, even to the extent of prohibiting actual improvements (*g*). There is an additional objection to structural improvements which involve partial demolition and reconstruction. The improvement occurs only after reconstruction, and it is possible that after demolition the tenant may become unable to complete the work (*h*). This objection is met by the possibility that, pending construction, a substitute security could be furnished by the tenant (*i*).

Acceptance of this rule may be partly explained by judicial bias in favour of landed interests as opposed to those of the tenant farmer, and against the economic progress attendant upon the increased use of the land (*k*). Whatever the explanation, examples of strict application of the rules of waste are found prior to the nineteenth century. Removal of doors, windows, and fixtures (*l*) (even though erected by the tenant (*m*)) and conversion of two rooms into one (*n*), or a hall into a stable (*o*) are properly considered as waste. These are structural alterations beneficial to the tenant, but prejudicial to the inheritance. Similarly, where a coach house and stable were converted into a butcher's shop (*p*). The same strict rule was applied where the landlord benefited in some degree by the conversion of a brew house into a number of small tenements with a resultant increase in the annual rental by eighty pounds sterling (*q*). Earlier, the conversion of a manual mill into a horse mill had been held waste (*r*).

D. The Modification of the Strict Rule

A slight modification of the strict rule was seen in *Brydges* v. *Kilburne* (*s*). In that case equity refused to enjoin the conversion of a log-wood mill into a cotton mill of great value, because the landlord had not objected after notice that the expense was being incurred (*t*). An indication of possible future development in the case-law appeared in *Young* v. *Spencer* (*u*). There the Court left to the jury the question

(*f*) *Farrant* v. *Thompson*, 5 B. & A. 826, 829, 106 Eng. Rep. 1392, 1393, 1394 (K. B. 1822); 2 Underhill, *Landlord and Tenant* (1909), 706; 6 Corn. L. Q. 125 (1920).

(*g*) Note (1928), 8 B. U. L. Rev. 312.

(*h*) *Id.* at 316.

(*i*) Note (1930), 43 Harv. L. Rev. 1130, 1134.

(*k*) *Id.* at 1130, n. 3.

(*l*) *Buckland* v. *Butterfield*, 2 B. & B. 54, 22 Rev. Rep. 649 (C. P. 1820).

(*m*) *Cooke* v. *Humphrey*, Moo. K. B. 178, 72 Eng. Rep. 515 (1563).

(*n*) Bac. Abr. tit. Waste, c. 5.

(*o*) *Ibid.*

(*p*) *Maunsell* v. *Hort*, 11 Ir. R. Eq. 478 (1877). In *Bonnett* v. *Sadler*, 14 Ves. Jr. 526, 33 Eng. Rep. 622 (Ch. 1808), lessees were restrained from pulling down the front of a house and converting upper rooms into lofts with the intention of adapting the premises to the business of a coachmaker. Cf. *Doe* d. *Dalton* v. *Jones*, 4 B. & Ad. 126, 110 Eng. Rep. 403 (K. B. 1832).

(*q*) *Cole* v. *Greene*, 2 Wms. Saund. 252, 85 Eng. Rep. 1037; s.c. *sub nom. Cole* v. *Green*, 1 Lev. 309, 83 Eng. Rep. 422, and *sub nom. Cole* v. *Forth*, 1 Mod. 94, 86 Eng. Rep. 759 (K. B. 1671).

(*r*) *City of London* v. *Greyme*, Cro. Jac. 181, 79 Eng. Rep. 158 (K. B. 1607).

(*s*) 5 Ves. 689 n., 31 Eng. Rep. 807 (Ch. 1792).

(*t*) Cf. *Duke of St. Albans* v. *Skipwith*, 8 Beav. 354, 50 Eng. Rep. 139 (Ch. 1845).

(*u*) 10 B. & C. 145, 109 Eng. Rep. 405 (K. B. 1829).

whether opening a new street door, without otherwise injuring the house, injured the reversion by impairing the evidence of title (*x*).

The Courts began to place more emphasis on the consequences of the act. In the seventeenth century the common law Judges had treated all acts previously adjudged waste, not as mere illustrations of a general principle, but as waste *per se* even though they improved the inheritance (*y*). This attitude is not confined to Judges of the seventeenth century. As late as the end of the second decade of the nineteenth century, the Lord Chancellor of Ireland said (*z*) that a tenant "is guilty of waste if he in any way alters the material form and features of the demised buildings".

Shortly after 1830, the English Courts appear once again to recall the true principle of waste clearly stated in Richardson, C.J.'s *dictum* that "the law will not allow that to be waste which is not in any ways prejudicial to the inheritance" (*a*). In 1833, Lord Denman said that no act can be regarded as waste which is not proved as injurious to the inheritance (*b*). Improved methods in description of land rendered the strict rule a "theoretical absurdity" (*c*), as now "the evidence of title could in no way be affected by taking down a barn adjoining a house, that house being still standing" (*d*). In 1875, Sir George Jessel said (*e*):

> You may prove an injury in the sense of destroying identity by what is called destroying evidence of the owner's title, and that is a very peculiar head of the law, which has not been extended in modern times.

The other alleged reasons for the strict rule may be counterbalanced by policies which justify the application of a more liberal rule (*f*). It is contended that there is a social interest in increased productivity of land. Public interest dictates that a tenant should be hampered as little as possible by vexatious restrictions without proportionate advantage to the reversion. Against this it is urged that a tenant can bargain for suitable premises. Unauthorised improvements should be limited to cases in which long term leases or changed conditions are involved.

A recent change in the attitude of the Courts toward leases may be significant to the matter under discussion. Changes in economic conditions have resulted in a greater emphasis upon the modern lease as a bilateral contract. Less emphasis is placed upon the creation of an interest in land by a lease (*g*). It may therefore be accurate to say that where a lease is silent, or contains only general provisions, on

(*x*) Cf. *Hyman* v. *Rose*, [1912] A. C. 623, 632.
(*y*) Ashburner, *Equity* (1902), 494.
(*z*) *North* v. *Guinan*, Beatty 342, 343 (Ir. Ch. 1829).
(*a*) *Barret* v. *Barret*, Het. 34, 35, 124 Eng. Rep. 321, 322 (C. P. 1628).
(*b*) *Doe* d. *Grubb* v. *Earl of Burlington*, 5 B. & Ad. 507, 517, 110 Eng. Rep. 878, 882 (K. B. 1833).
(*c*) *Doherty* v. *Allman*, 3 App. Cas. 709, 735 (1878).
(*d*) *Huntley* v. *Russell*, 13 Q. B. D. 572, 588, 116 Eng. Rep. 1381, 1388 (1849).
(*e*) *Jones* v. *Chappell*, L. R. 20 Eq. 539, 542 (1875).
(*f*) This matter is well discussed in 6 Corn. L. Q. 124 (1920); 15 Corn. L. Q. 501 (1930); 14 Harv. L. Rev. 226 (1900); 43 *id.* 506; *ibid.* 1130; 19 Mich. L. Rev. 105 (1920); 2 So. Cal. L. Rev. 399 (1929); 31 Yale L. J. 781 (1922).
(*g*) See Bennett, *The Modern Lease—An Estate in Land or a Contract* (1937), 16 Tex. L. Rev. 47; Woodruff, *Lessor and Lessee, Parties to a Contract or Landlord and Tenant* (1939), 8 Univ. Kan. City L. Rev. 35.

structural improvements by the tenant, the Court has the task of deciding from all the circumstances what the contracting parties might reasonably have specified on this matter. Attention should be paid to local custom, the nature of the premises, the use for which the land was leased, and particularly the length of the term. It may be objected that this view of leases as bilateral contracts rather than as creation of interests in land is confined to short leases. A lease for a long term must still be regarded primarily as the creation of an estate. Even if this is so, the tendency to regard perpetually renewable leases and long term leases as almost equivalent to tenancy in fee simple absolute (*h*), would justify the allowance of great freedom of user by the tenant (*i*).

Smyth v. *Carter* (*k*) in 1853 marks the end of the cases in which the Courts adhered to a restrictive policy toward tenants for years. In that case a tenant was enjoined from demolishing the demised premises, a dilapidated public house, with a view to substituting a brewery. Lord Romilly, Master of the Rolls, said (*l*):

> I entertain no doubt that this Court will restrain a tenant from pulling down a house and building any other which the landlord dislikes. It is not sufficient to show that the house proposed to be built is a better one; and the fact of the defendant's showing that the landlord does not know his own interest will not affect the judgment of the Court in any respect whatever. The landlord has a right to exercise his own judgment and caprice whether there shall be any change.

The decision may have been correct as the case concerned a tenant from year to year, but the final sentence in the passage quoted does not state the present attitude of the Courts. This is made clear by the decision of the House of Lords some twenty-five years later in *Doherty* v. *Allman* (*m*). There a storage warehouse had been demised for 999 years. The location of the property was such that other stores in the town obtained the bulk of the available storage business, making it difficult for the tenant to sub-lease the premises. The tenant proposed to make considerable structural alterations to convert the property into six dwelling-houses. The House of Lords affirmed the judgment of the Court of Appeal, denying an injunction. Lord O'Hagan said (*n*):

> We have heard much comment, on the one side and the other, with reference to the length of the term in this case. I do not rely upon that as the only circumstance in the case upon which the judgment of the Court of Appeal should be sustained; but where, in a case of this sort we are asked to exercise our discretionary jurisdiction, it is surely material to see that the interest

(*h*) Consider two examples. Perpetually renewable leases existing on January 1, 1926, or attempted to be created after 1925 were converted into terms of 2,000 years by the English Law of Property Act, 1922, 12 & 13 Geo. 5, c. 16, s. 145, 15th Sched., paras. 1, 5. Some long terms are enlargeable into estates in fee simple under the English Law of Property Act, 1925, 15 Geo. 5, c. 20, s. 153.

(*i*) Cf. the remarks of Lord O'Hagan in *Doherty* v. *Allman*, 3 App. Cas. 709, 726, quoted *infra*.

(*k*) 18 Beav. 78, 52 Eng. Rep. 31 (1853).

(*l*) *Id.* at 79.

(*m*) 3 App. Cas. 709 (1878).

(*n*) *Id.* at 726.

> of the individual who is only to come into possession of the premises at the end of 900 years is infinitesimally small compared with the interest of the man who is the tenant, and who, with his successors, is to hold the premises all that time, upon whom the effect of our exercise of this jurisdiction would be to tie up his hands, to destroy their property, and to inflict great damage upon them during the course of the many centuries that are to come. . . . We have the most conclusive evidence that the change will be beneficial.

The learned Lord admitted (*o*) that the words used by Lord Romilly in *Smyth* v. *Carter* (*p*) apparently expressed a strong contrary opinion. But, he observed (*q*), these *dicta* in an interlocutory proceeding, without benefit of full argument were wholly inapplicable to tenants for long terms even if they were applicable to tenants from year to year. Lord O'Hagan went on to say (*r*) :

> But beyond all that, if the latter words of the *dictum*, . . . were to be taken in their literal sense, and as applicable to this case, the effect would be to make the landlord absolute arbiter of the fortune, good or ill, of his tenant with reference to these premises for a period of 900 years . . . I for one should be prepared to exercise the jurisdiction of this House, and say that this is not and cannot be the law.

The case established a rule applicable to long leases (*s*) and left open the question of whether it would be extended to short leases and life tenancies. This extension has not been made. In 1927, a yearly tenant was enjoined against making a substantial alteration changing the character of the demised premises (*t*). In the words of Scrutton, L.J. (*u*), there is an implied contract by a tenant to use the premises in a tenant-like manner. This means at any rate that he will not change the character of the premises by structural alterations (*x*).

E. Summary

It may be useful to summarise the above discussion. Acts by a limited owner causing more than trivial damage to the inheritance constitute waste entitling an appropriate plaintiff to judgment for damages or an injunction. When description of land was by reference to its physical features, any change in the character of the land or buildings prejudiced the inheritance because it impaired the evidence of title. It therefore constituted waste. Later, when conveyance by reference to land monuments was no longer in vogue, the Courts, losing sight of the principle of waste (injury to the inheritance), still held

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(*o*) *Id.* at 727.
(*p*) 18 Beav. 78, 52 Eng. Rep. 31 (Ch. 1853).
(*q*) 3 App. Cas. 709, 727.
(*r*) *Ibid.*
(*s*) Accord: *Meux* v. *Cobley*, [1892] 2 Ch. 253.
(*t*) *Marsden* v. *Edward Heyes, Ltd.*, [1927] 2 K. B. 1. See also *West Ham Central Charity Board* v. *East London Waterworks*, [1900] 1 Ch. 624; cf. *Nottingham* v. *Osgood*, 3 Sedgwick, *Damages* (9th ed. 1912), s. 950, n. 257 (Ont.).
(*u*) [1927] 2 K. B. 1, 7.
(*x*) This rule when first stated in *West Ham Central Charity Board*, [1900] 1 Ch. 624, was criticised in 14 Harv. L. Rev. 226 (1900). There the somewhat odd remark is made that if the lessor considers important the return of the premises as they were at the commencement of the term, he should so stipulate in the lease. Such a view would seem to advocate total abolition of all liability for waste by tenants for years. Compare note (*d*), p. 284, *supra*.

that any change in the character of the premises was actionable. Still later, the Courts realised the unreasonableness of holding to be waste those changes in the character of the premises which in fact enhance their capital value. In the opinion of the writer, there followed a return to an application of the true principle. Others may see the modification rather as the creation of a new rule, not a return to the true principle of waste. It is thought that the criterion of injury to the inheritance is established by the authorities cited earlier in this article. But those who regard waste as prohibiting *any* change in the nature or character of the premises, inevitably must accept the development of meliorating waste as evolution of a new rule. Whether it is a new rule or application of an old principle to new circumstances is questionable, but no uncertainty exists on the fact that the modification of the strict rule came about. Thus, acts which are designated meliorating waste are not enjoined merely because they change the character of the premises. Nor do they give rise to an action for damages because, *ex hypothesi*, they cause no damage. The Courts, however, find waste to be meliorating only when the act complained of is done by a tenant for a long term. The reason for this, it may be suggested, is that such a tenant and his successors or assigns will have to bear the increased cost of repairs for the period which is at all material. On the other hand, under a short term or a life estate, the burden of increased repairs may well soon rest upon the reversioner or the remainderman respectively. In the latter case, too, there exists a greater possibility that the tenant's delay, for one reason or another, in reconstructing after partial demolition will extend to the end of the term or life estate. A change in the locality, necessitating alteration of user, is the most persuasive influence upon Courts which are urged to find an act meliorative.

RULE AGAINST PERPETUITIES AND AGE OF MARRIAGE

By J. H. C. Morris, M.A., B.C.L., Barrister-at-Law

In *Re Gaite's Will Trusts*, [1949] 1 All E. R. 459, Roxburgh, J., had to decide a novel point in the rule against perpetuities. The testatrix gave property on trust for A for life and after her death on trust for " such of her grandchildren living at my death or born within five years therefrom who shall attain the age of twenty-one years or being female marry under that age ". At the date of the testatrix' death A was a widow aged sixty-five years; she had two children living and one grandchild aged eight.

It is clear that a gift by will to such of the grandchildren of A as shall attain twenty-one is void (unless A predeceases the testator or unless a grandchild has attained twenty-one at the testator's death), because A may have children born after the death of the testator, and the children of such children may not be born within twenty-one years

after the death of lives in being at the testator's death. It makes no difference (at least in a Court of first instance) that A is a woman past the age of child-bearing. But in this case Roxburgh, J., upheld the gift on the ground that it was impossible for children of A born after the testatrix' death to have children of their own born within five years of the death, not because it is physically impossible for a child of four to produce children, but because by the Age of Marriage Act, 1929, " a marriage between persons either of whom is under the age of sixteen shall be void ". " In construing the rule ", said the learned Judge, " I must have regard to the statute law of England ".

The decision is perhaps right in the result, for a reason to be mentioned later, but the reasoning is (with respect) open to question.

If the reasoning is correct, it would follow that a gift to such of the grandchildren of A as should be born within fifteen years of the testator's death and should attain twenty-one would be good. But in that case, A might have a child born after the testator's death; that child might acquire a domicile in Northern Ireland and might lawfully marry there at the age of fourteen; and children of that marriage might be born within fifteen years of the testator's death and so capable of taking under the will; but such children might not attain twenty-one until more than twenty-one years after the dropping of lives in being at the testator's death.

It is settled law that a marriage which is valid by the law of each party's domicile at the date of the marriage and by the law of the place of celebration is valid in England, though within the prohibited degrees of English domestic law. It is also settled that the children of such a marriage can take under a gift to children contained in an English will or settlement : *Re Bozzelli's Settlement*, [1902] 1 Ch. 751; compare *Re Bischoffsheim*, [1948] Ch. 79 (where the parties were not even domiciled in the foreign country at the date of the marriage). It would seem to follow that the same principles are applicable to the age at which parties can lawfully marry, since that is also a question of capacity to marry. There is, admittedly, no reported English authority on this question, but the principle is not doubted by writers on the conflict of laws. And it has recently been held by the Recorder of London that a marriage celebrated in Northern Ireland between a man domiciled in England and a girl of fourteen domiciled in Northern Ireland is valid in England : *R.* v. *Salthouse* (1948), 12 Jo. Cr. L. 376. It could hardly be argued that it is contrary to English public policy to recognise such a marriage, since by English domestic law before the Act of 1929, marriages between persons aged fourteen were valid. It is therefore submitted that a gift to such of the grandchildren of A as shall be born within fifteen years of the testator's death and shall attain twenty-one is too remote, unless of course A predeceases the testator, or unless the rule of convenience closes the class at the testator's death.

But the decision in the instant case can be supported on the ground that even if there are countries in the world where children of four can lawfully marry, it would be contrary to public policy to recognise such marriages in England for any purpose whatever. Another way of supporting the decision would be to hold that it is physically impossible for a child of four to have a child. But there are two difficulties

in this argument. One is that having regard to the line of cases from *Jee* v. *Audley* (1787), 1 Cox 324, to *Re Deloitte*, [1926] Ch. 56, it takes some courage to argue that evidence of this nature is admissible in a Court of first instance. The other difficulty is that the evidence would have to show, not merely that a particular person is incapable of child-bearing (as in the *Jee* v. *Audley* situation), but that no child of four is so capable. Can medical science be as positive as that?

The conclusion is submitted that it is unsound to base a legal impossibility on an English statute without also considering the scope of its application in the conflict of laws. Counsel for the next-of-kin admitted that the matter was concluded by the statute law *of England.* So far as appears from the report, neither Court nor counsel considered the implications of the conflict of laws.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

Contract by person subsequently acquiring fiduciary relationship—right to make a profit from trust.—Re Mulholland's Will Trusts, [1949] 1 All E. R. 460, probably provides no new law but is a good practical example. A bank had obtained an option to purchase from the lessor in a lease. The bank became the lessor's executor and trustee and subsequently purported to exercise the option. Wynn-Parry, J., held that the fact that the bank was at the date of the *exercise* of the option in a fiduciary position did not prevent the bank from exercising it, citing *Vyse* v. *Foster* (1874), L. R. 7 H. L. 318. The learned Judge distinguished *Wright* v. *Morgan,* [1926] A. C. 788, on the ground that in this case the option was created by the will, which also created the fiduciary relationship in the person in whom the option was vested, namely, one of the executors. The learned Judge also pointed out that the option in the will was not a contractual right, and there were other distinguishing characteristics (see at p. 463).

It is, however, necessary to point out that the learned Judge limited his decision to the particular type of option, namely, an option to purchase, which, as he pointed out, has been held to create an interest in land at the date of its creation: *L. & S. W. Ry.* v. *Gomm* (1882), 20 Ch. D. 562. Consequently, the notice of the exercise of the option by the bank did not really create any new rights between the parties.

Option to purchase—notice to exercise served on personal representatives of the grantor.—Kennewell v. *Dye,* [1949] 1 All E. R. 881, is convenient as a reminder, though it primarily turns upon construction. A tenancy agreement contained an option to purchase on three months' notice. The option was expressed in the form of agreement and there was no reference to the lessor's executors, administrators and assigns. Roxburgh, J., held, as a matter of construction, that the option was binding on the lessor's personal representatives on the ground that there was nothing in the agreement which showed a contrary intention and nothing in the contract to make it personal

to the lessor. The suggestion that notice must be given to the lessor, and that this could not be done, because he was dead, was held to be contrary to the old case of *Harwood & Buicks* v. *Hilliard* (1677), 2 Mod. Rep. 268, which applied generally to obligations affecting the estate.

The fact remains that options intended to bind the estate of the person granting the option are better so expressed, but, of course, this is usually covered by an interpretation clause.

(1 K. & E., p. 960, n. (g).)

Emergency powers—enforcement of mortgage—"unable" to perform obligation.—In *Re Legal Charge,* [1949] 1 All E. R. 477, Roxburgh, J., gave immediate leave to enforce remedies against a trustee in bankruptcy whose objection apparently was that in three months time the property would be worth substantially more. At the time of the order the learned Judge held that the property could be realised for much more than the value of the mortgage and so the trustee could raise the money. But he also held that the word "unable" did not mean "unable in the prudent course of management". And the learned Judge pointed out, whether or not a mortgagor is or is not unable in the prudent course of management to perform the obligation, the Court has a discretion, under the Courts Emergency Powers Act, though in this case the learned Judge was unwilling to exercise it in his favour.

Settled leaseholds—war damage—value payments—capital or income.—*Re Scholfield,* [1949] 1 All E. R. 490, is of interest because similar sorts of problem are likely to arise under the Planning legislation. Romer, J., held that a value payment in respect of war damage did not fall within either Settled Land Act, s. 79, or Trustee Act, s. 20. The money so payable was not received under an insurance policy, and though the notion of sale was introduced by the Act as a method of computing the amount it was done so for the purpose only of quantification. The result of so holding was in this case to treat the capital payments exactly as if they were the actual property destroyed, so that the beneficiaries of the leaseholds took to the exclusion of the persons entitled in remainder. This depended upon the construction of the particular will, and leaves open the destination of such payments in other cases. It should, however, be pointed out that the payments in respect of freehold had been conceded to belong to capital. So far as the leaseholds were concerned the trustees were directed to recoup capital with the contributions under the Act and, subject to that, purchase an annuity for the period unexpired of the lease.

Settlement—exclusion of eldest son from participation.—Where provision is made for "younger children" a satisfactory clause is difficult to draft which will give effect to the settlor's intentions. This has led to a mass of authority not easy to reconcile, and in *Re Gunter's Settlement Trusts,* [1949] 1 All E. R. 680, Vaisey, J., observed (at p. 683): "It seems to me that I have really ample authority for deciding this case either way". Here the trust was for all the children of R. G. "(other than an eldest son or only surviving son or an eldest or only surviving daughter entitled for the time being under his will to his real estates for his or her life)" after the death of A. The eldest son of R. G. succeeded to the real estate of R. G.

and died in the lifetime of A. Vaisey, J., held that the exception clause included the deceased life tenant, because he had been a life tenant though he was not life tenant at the death of A, that is, at the date of distribution. To reach this conclusion he adopted a principle expressed by Simonds, J., in *Re Leeke's Settlement Trusts,* [1937] Ch. 600. The principle is to look at the reasonable and probable purpose and intention of the excluding clause, and the learned Judge came to the conclusion that on the words of this settlement it was the intention to exclude any person who had been or was at the death of A the life tenant of the realty of R. G. It should be added that this decision was come to " with a good deal of hesitation ".

Actually, these excluding clauses should always state the date or dates at which the excluding factors are to be considered, and not rely on the authorities. For example, in the present limitation, instead of the words " entitled for the time being " should have read " entitled whether during the life of A or at her death ", or some such words, but this would have left the problem of " eldest son " open. It is these highly complicated clauses that need revision. The excepting clause should, in fact, be stated separately—so the trust here begins: " Upon trust for all the children . . . ", and at the end of the clause, instead of in brackets the exception can be stated by way of proviso or separate clause. This prevents attempts to shorten parentheses, which lead to difficulty.

(2 K. & E., pp. 722, 746.)

Perpetuities—legal impossibility.—Re Gaite's Will Trusts, [1949] 1 All E. R. 459, presents considerable difficulty on its facts owing to the rules governing valid marriage, but this point is dealt with elsewhere (p. 289). For the purposes of this note the point of the case was that Roxburgh, J., held that a gift to grandchildren living at the death of H. G., or born five years therefrom, was held not to be invalid, because all children of H. G. born in the lifetime of the testatrix would be lives in being, and any child born to H. G. after the death of the testatrix could not marry and have children within five years of the death of the testatrix. The ground on which Roxburgh, J., made this decision was not that of physical impossibility but of legal impossibility, since to marry, the parties must be sixteen years of age under the Age of Marriage Act, 1929, s. 1.

There is nothing new in principle that a legal impossibility may make a contingency not too remote. It was a common place with legal contingent remainders (though sometimes overlooked). For example, a limitation to A. with remainder to the first son of A. to attain twenty-five was not invalid, because legally the remainder could only vest in A.'s son who attained twenty-five, provided he did so in A.'s lifetime. It is, however, more difficult to find cases where the legal impossibility of the contingency has nothing to do with the vesting of the contingent interest and, in fact, no authority seems to have been cited. There is, however, nothing inherently unlikely in this principle applying to other contingencies.

Trustees for sale—power to invest in land.—Re Wellsted's Will Trusts (noted *ante,* p. 57) has been overruled in the Court of Appeal, [1949] 1 All E. R. 577. The Court of Appeal held that trustees for sale have the power to reinvest in land not only the proceeds of an immediate sale of land but also any proceeds of sale of land, though reinvested in personalty, provided that they can be traced. The decision expressly did not affect *Re Wakeman,* [1947] Ch. 177, where it was held that after trustees

for sale have disposed of all land their power to invest in land has ceased. It is respectfully doubted whether the decision can stand. The principal argument of the Master of the Rolls in *Re Wellsted* (*supra*) appeared to turn on the fact that section 28 (1) of the Law of Property Act conferred *all* powers on the trustees for sale, that the power or discretion to invest in section 73 of the Settled Land Act must be treated as one of the powers, and there was no context for cutting down the effect of the word "all". The Master of the Rolls suggested that section 73 (1) (xi), which relates to the power to invest in land does not use the word "investment" at all. This may be significant. In *Re Power's Will Trusts*, [1947] Ch. 572, it was held that a power to invest in land did not include a power to purchase for occupation. Obviously the Settled Land Act itself contemplates purchase for occupation, and trustees for sale *may*, therefore, have the power to purchase for occupation as well as investment. No doubt this is often done in practice, and it would be most convenient, if this reading of the power is correct.

It should also be noticed that as proceeds of sale can be reinvested in land so long as they can be identified, some further problems arise. If, for example, *Re Wakeman* (*supra*) is held to be inconsistent with *Re Wellsted* (*supra*), it may well be that a trust for sale of land may last indefinitely independently of the existence of any land. It is hoped to deal more fully with the whole problem in an article.

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2. *CHARITIES*

Charitable bequest—gift to use at discretion "for the welfare of cats and kittens needing care and attention".—Romer, J., held that the gift was a good charitable bequest in accordance with the principles laid down in *Re Grove-Grady*, [1929] 1 Ch. 557. It is necessary to show that a trust for animals must also produce some benefit for mankind, but that this trust was calculated to secure good treatment for animals. It was argued that the welfare of cats and kittens was not sufficient, but the learned Judge said that this gift went rather further than that. The case is not significant, except that it contains a considered application of *Re Grove-Grady* (*supra*), where the Court of Appeal held on the facts that the gift was not charitable.

(Tudor, p. 47; 2 K. & E., p. 299.)

"Religious purposes"—element of public benefit—gift to "contemplative nuns".—Re Coats' Trusts (noted *ante*, Vol. 12, pp. 140, 296) has now been considered in the House of Lords *sub nom. Gilmour* v. *Coats*, [1949] 1 All E. R. 848. The House of Lords affirmed the decision of the Court of Appeal that a gift to be applied for the purposes of a Carmelite convent, where the nuns are strictly cloistered and purely contemplative, is not a gift for charitable purposes as it lacked the element of public benefit. It applied the decision in *Cocks* v. *Manners* (1871), L. R. 12 Eq. 574, and the question of the correctness of the decision in *Re Caus*, [1934] Ch. 162, was expressly reserved. Consequently, a bequest for saying masses in private may not necessarily constitute a good charitable bequest, but, as Lord Simonds pointed out (at p. 855), such an important matter could only be decided on a direct consideration of it.

The problem of "public benefit", as applied to religious purposes, is manifestly one of great difficulty, because it depends in the last resort on evidence interpreted in the light of existing legal authority. The opinions

of the learned Law Lords on this point can be studied satisfactorily only in their full context, and cannot, therefore, be made the subject of this note. Nevertheless, it may be pointed out that the Court is not bound to accept the view of the particular branch of religion, as represented by the evidence of responsible members, that a particular activity, such as private intercessory prayer, would result in public benefit. This would be a matter of belief not susceptible of proof.

Two other points were argued in favour of the charitable character of the gift. First, that the example of the pious lives of the cloistered nuns was calculated to be a " public benefit " in its effect upon the lives of others not within the community. Secondly, that the trusts were beneficial to the public because it was not limited to existing members of the community but provided facilities to the public for others of its members to become members of the community.

The first argument was rejected on the ground that the benefit was too remote or not susceptible of sufficient proof. The second was rejected, notwithstanding its apparent analogy to " open scholarships ", because it must in fact assume that the purposes of the community were charitable, whereas the Court had already decided that they were not.

It is, however, important to point out that the Court, in reaching this decision, seems to have been much influenced by the existence of the decision in *Cocks* v. *Manners* (*supra*), which had been followed for a long period. It would, therefore, be unsafe to rely upon it in all possible cases where the religious exercise is not of a public character. It is, however, of the greatest importance to bear in mind that it emphasises that not all " religious purposes " are charitable purposes. Gifts intended to obtain the benefits of " charity " must be made in such a form that they can only be applied to those religious purposes which are charitable. It is important to bear this in mind when framing gifts to a religious body which is to have wide discretionary powers, as the decision in *Dunn* v. *Byrne,* [1912] A. C. 407, and the decisions since that case amply bear out.

(Tudor, pp. 9–11, 15; 2 K. & E., p. 299.)

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3. *WILL CASES*

By A. K. R. Kiralfy, LL.M., of Gray's Inn, Barrister-at-Law

Renunciation of legacy—retraction permitted.—There are not many cases on the subject of the disclaimer and renunciation of legacies. In *Re Cranstoun,* [1949] 1 All E. R. 871, a residuary legatee was permitted to retract the renunciation of a legacy, following *Re Young,* [1913] 1 Ch. 272. Such renunciation is only irrevocable if consideration is given for it or if some party has altered his position to his prejudice in reliance on it. The privilege was a recognition of the fact that onerous bequests cannot be forced on legatees; it was introduced in relief of legatees and will not be strictly construed so as to penalise them without reason. It is interesting that the legatee renounced in this case in the belief that he would have to take out a grant of letters of administration if he accepted, being a person entitled to apply for a grant. The legatee also imagined that acceptance of the gift of a house involved personal liability for a possible deficiency on a mortgage on that house. Although a devisee of a house cannot claim exoneration of mortgages out of other estate (Administration of Estates

Act, 1925, s. 35), no statute imposes personal liability on the devisee if the house is insufficient to repay the mortgage (*Syer* v. *Gladstone* (1885), 30 Ch. D. 614, 616; *Re Baron Kensington*, [1902] 1 Ch. 203, 212 (n.)).

Family provision—reasonable provision—alternative free State provision.—Re Watkins, [1949] 1 All E. R. 695, is probably the first of many decisions which will be concerned with the widespread transfers of responsibility from private to national sources. The Inheritance (Family Provision) Act, 1938, s. 1 (1), provided that a daughter who was of unsound mind should be a "dependant" entitled to apply for benefit under the Act. The basis of this enactment was the inability of such a person to provide for herself and the moral responsibility of the parent to do so. Under the National Health Service Act of 1946 free provision is now available for mental patients. Roxburgh, J., held that reasonable provision was made in a will if the "dependant" would otherwise be provided for: "I think that this Testator was entitled, if he was so minded, to distribute his estate on the footing that his daughter could, as she certainly should, take advantage of the provisions of the National Health Service Act, 1946". It is to be noted that the latter Act provides (section 1 (2)) that "the services so provided shall be free of charge except where any provision of this Act expressly provides for the making and recovery of charges". In most cases no right of recovery against relatives or other persons in fact exists. This was, no doubt, a deliberate design. It is interesting that the provisions for the enforcement of private rights of action for injuries which were embodied in the National Health Insurance Act, 1936 (ss. 51–53), have been repealed. The Law Reform (Personal Injuries) Act, 1948, s. 2 (1), (4), leaves the injured person the right to recover damages from a wrongdoer subject to deduction of one-half the sickness benefit received from the State, and the right to use a doctor as a private patient. But no general right of recourse against wrongdoers in exoneration of the expenses of the free services appears to exist. The effects of this state of affairs may be serious, not only in aggravating the financial burdens of the public but also in weakening the deterrent effect of the threat of lawsuits in maintaining standards of care.

Family provision—relation of maintenance to standard of living of dependant.—Re Borthwick, [1949] 1 All E. R. 472, is a useful case in a subject where the cases have tended to have narrow applications. The Inheritance (Family Provision) Act, 1938, s. 1, allows claims for maintenance against the provisions of a will, where the testator has failed to make reasonable provision for a dependant. Harman, J., held in this case that a wife who had only had £150 p. a. and was left £250 p. a. by her husband's will should have £1,000 p. a. out of £130,000 net estate. The learned Judge rejected the argument that a woman who had eked out an existence on a very small income during the lifetime of a wealthy husband must endure that condition after his death. He did take her habits into account in deciding how much income she really needed to satisfy her customary wants. An unmarried daughter earning £2 10s. p. w. and living with her mother was ordered a separate allowance of £100 p. a. so long as she did so, as the mother would make some provision for her needs. Two other points were made in this case. "Conduct" of the applicant for maintenance will probably be relevant on the amount of maintenance ordered, but may not necessarily exclude her from benefit

altogether, even where, say, a wife has been partly to blame for an estrangement. And a signed writing left by the testator is a two-edged sword. It may satisfy the Court that he had good reason for cutting off some dependant, but it may also serve as evidence against the testator and show that he was actuated by spite or that his motives were unreasonable.
(Theobald p. 76.)

Executors getting in estate abroad—commission allowed by foreign law —no duty to account.—In *Re Northcote's Will Trusts,* [1949] 1 All E. R. 442, is a decision which emphasises the paucity of authority in this country on the conflict of laws of trusts and mortgages. In past times conflicts commonly arose with Scots or French law. Today many settlements involve the application of Dominion or American law, in which the English institution of the trust also exists. In the instant case a testator died domiciled in England. His executors were unable to satisfy the death duties on his whole estate out of the assets in England and entered into an undertaking with the Inland Revenue to take out a grant in the State of New York and realise certain assets there. In the State of New York trustees and executors are entitled to compensation for their services. In all American States such provision exists, either by statute or by case-law developments (*Scott on Trusts,* vol. 2, p. 1383). Harman, J., held that the executors might retain this commission. The main basis of his decision was the involuntary nature of the application for the American grant, thus attracting the principle of *Re Gee,* [1948] 1 All E. R. 503, that the trustee must only account if he himself tried to obtain the benefit. But the decision also suggests that it would be pointless to make the trustee disgorge these amounts since an American agent acting for him would be entitled to keep them. Some distinction exists between the law governing devolution and that governing administration, but the law is too undeveloped to hazard any general opinion, and the forum of the domicile may well apply its own law to all personalty settlements, even in matters of this kind.

Construction—" children "—adopted child.—*Re Fletcher,* [1949] W. N. 199, decides that the Adoption of Children Act, 1926, s. 5 (2), which excludes adopted children from taking under dispositions to " children " unless a contrary intention appears is satisfied if the testator knew that the person to whose " children " a gift was made was unable to have children of her own. In fact the testator treated these adopted children of his daughter as his grandchildren. Roxburgh, J., pointed out that illegitimate children had been allowed to take in such cases (*Hill* v. *Crook* (1873), L. R. 6 H. L. 265) and " it was unthinkable that Parliament intended to place an adopted child in a worse position than an illegitimate child ".
(Theobald 223, 225.)

Construction—wasting asset—express term of will—treatment of war damage value payment.—*Re Scholfield,* [1949] 1 All E. R. 490, is an important case arising out of the war. A testator left certain leaseholds in settlement and expressly provided that no provision should be made to adjust in favour of the remainderman. The leasehold houses were destroyed, the leases disclaimed, and a war damage value payment received. As the testator had shown an intention that the remainderman should not

be compensated for depreciation of the leases Romer, J., held that an annuity should be purchased for the balance of the original unexpired term of the lease, to approximate to what the testator had intended. *Askew* v. *Woodhead* (1880), 14 Ch. D. 27, was followed on this point. In that case short leases had been compulsorily purchased and Jessel, M.R., ordered an annuity to be purchased to run out when the lease would have expired.

(Theobald 387.)

Construction—"plant"—houses used for business and residence.—In *Re Betts,* [1949] 1 All E. R. 568, a gift of "plant" was held not to pass a freehold house part of which was used for residence. In *Blake* v. *Shaw* (1860), John 732; 70 Eng. Rep. 615, a gift of "plant" was held to pass leasehold business premises. "Plant" signifies fixed business apparatus. Wood, V.-C., there decided that the premises had no value except as an "adjunct" of the business, but he made it clear that he was not laying down any general principle.

(Theobald 160.)

Construction—"If in my service"—receiver appointed on testator's insanity.—In *Re Silverston,* [1949] 1 All E. R. 641, legacies to servants were held not to have lapsed by reason of the appointment of a receiver in lunacy. The servants had been kept on by the receiver without duties but were ready to serve if the testator recovered. The main ground of the decision appears to be that the receiver is the statutory agent of the lunatic and continues their employment on his behalf (*Re Wheater,* [1928] 1 Ch. 223, 228, states the general principle of the agency of a receiver). In *Re King,* [1917] 2 Ch. 420, continuance of servants by a committee of the person of a lunatic was held not to qualify them as "in the testator's service", but there the committee is not an agent but makes his own arrangements to maintain the lunatic. It is questionable whether the average testator contemplates such a situation when he makes his will, or, if he does so, whether such technical distinctions would impress him.

(Theobald 215.)

Devise to "trustees"—evidence inadmissible to give them beneficial interest.—In *Re Rees' Will Trusts,* [1949] 1 All E. R. 609, a testator made a residuary devise to trustees on secret trusts which did not exhaust the gift. It was held that evidence was not admissible to show that they were to keep the balance (following *Irvine* v. *Sullivan* (1869), L. R. 8 Eq. 673). A gift subject to the performance of certain trusts would be treated differently, but here there was a formal appointment of the devisees as trustees, followed by a devise to them in that character. Vaisey, J., was unable to relax the rule since the trustees, though close friends of the testator, were strangers in blood, though he felt that the testator probably had intended them to take the surplus in fact.

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4. *FAMILY LAW CASES*

By R. H. Graveson, Ph.D., S.J.D., LL.M., of Gray's Inn, Barrister-at-Law

Breach of promise of marriage—questions of jurisdiction and choice of law—Kremezi v. *Ridgway,* [1949] 1 All E. R. 662.—Cases on breach of promise of marriage involving questions of the conflict of laws are rare and notable events in English Courts. In *Kremezi* v. *Ridgway* it was possible to cite only a single, little-known precedent on the direct issue, *Hansen* v. *Dixon* (1906), 96 L. T. 32, and Hilbery, J., in the case under review thought it proper to resort to *Hamlyn* v. *Talisker Distillery,* [1894] A. C. 202, dealing with the proper law of a commercial contract which contained a submission to English arbitration, as embodying the guiding principle for contracts of this very different class.

The facts of *Kremezi* v. *Ridgway* were as follows: a Greek woman became engaged in Greece to marry an Englishman, and the agreement was later renewed in England with the intention of being in substitution for the earlier one. Although it was arranged that the marriage ceremony should take place in Athens, the intention of both parties was to make their matrimonial home in England. The Englishman unjustifiably broke the contract, and on the question as to whether Greek or English law governed the contract rested the measure of damages, which under Greek law were special but under English law were at large. There was no difference between the two legal systems on the question of the obligations to which the contract gave rise. Hilbery, J., concluded that the contract was to be governed by English law and that damages should be awarded on English principles, since the difference between the relevant Greek and English law was merely one of *remedy,* and (citing with approval Bray, J., in *Hansen* v. *Dixon*), "the mere fact that the remedy given by the foreign law is different will not disturb the jurisdiction of the English Court".

Though the result of this decision may be welcomed on grounds of principle and justice, the reasoning is not free from objection. If one accepts Hilbery, J.'s classification of the measure of damages as being purely a matter of remedy, it is *ipso facto* governed by English law as the *lex fori,* for jurisdiction *in personam* properly exists by reason of the presence of both parties before the Court. The question of what law governs the substance of the contract thereby becomes irrelevant as to the question of damages, and indeed only concerns the validity of the contract, on which no conflict between English and Greek law existed. The search for the proper law of the contract, on the other hand, is all-important if the question of limited or unlimited damages depends on the proper law, and not on the *lex fori.* In short, one part of this judgment appears inconsistent with the other part. There is a further question of some difficulty. The learned Judge gave a welcome classification of the essential nature of the concept which English Courts will regard as contractual, whatever its foreign origin or connections, when he remarked (at p. 663), "It is the mutuality of promises which English law regards as essential if a contract is to be made, and, therefore, the undertaking was one which the English law recognises as a contract"—(cf. *Re Bonacina,* [1912] 2 Ch. 394). Having established that point, he ascertained the proper law of the contract on the basis of the intention of the parties as indicated by the law of the place of performance. Was this to be Greece, where the ceremony was to take place, or England, where the renewed contract had been made and where the parties were to live as husband and wife? Hilbery, J., decided in favour of England, observing (*obiter*), "that while

it is true that this peculiar type of contract—the exchange of mutual promises to marry—ends, so far as legal enforcement is concerned, on the performance of the marriage ceremony, none the less the performance which the parties contemplated at the time they exchange mutual promises is not exhausted by the performance of a mere ceremony". This is true: but it is doubtful whether considerations of the parties' intention beyond the scope of legal enforcement *on this particular cause of action* should be allowed decisive effect on the choice of proper law, for what the learned Judge designated as "the mere fact that the ceremony was to be performed in Athens" carried little or no weight against the consideration of an English matrimonial home. It is respectfully suggested that the contract to marry is legally performed when a valid ceremony has taken place, and the legal obligations between the parties thereafter no longer rest on contract, but purely on the status conferred on them by law as a result of a valid ceremony. It seems not unimportant to keep clear this distinction between contract and status. The former is a matter of private, voluntary and limited obligation: the latter one of public, involuntary legal condition, and the fact that in certain cases, such as marriage, status will only be conferred on the basis of a voluntary act, the ceremony of marriage, does not reduce the need to maintain this distinction and its legal consequences.

(Graveson, Conflict of Laws, 85 ff., 95, 147.)

Basis of summary jurisdiction in cases of husband and wife—Summary Jurisdiction (Married Women) Act, 1895, *s.* 4—*Macrae* v. *Macrae,* [1949] 1 All E. R. 290.—Professor Gutteridge has recently indicated some of the very difficult practical problems of jurisdiction and enforcement of maintenance orders in cases involving situations of the conflict of laws (see *The International Enforcement of Maintenance Orders,* 2 International Law Quarterly, 155 (1948)). One of those particular problems has presented itself twice recently to English justices in petty session. The first case, *Forsyth* v. *Forsyth,* [1947] 1 All E. R. 406, reversed [1948] L. J. R. 487, has already been noted (Vols. 11, p. 294; 12, p. 231). With it must now be read the judgments of Lord Merriman, P., and Hodson, J., constituting a Divisional Court on appeal from Manchester justices, who in *Macrae* v. *Macrae* had made an order against the husband on the ground of desertion. The husband in this case had been living with his wife at her parents' home in Manchester until June, 1948, when he left his work and returned to live with his parents in Scotland, where he offered his wife accommodation. It was not disputed that the wife's summons for desertion was issued after the husband had gone to Scotland, where he apparently had his domicil of origin. In the judgments of the Court of Appeal in *Forsyth* v. *Forsyth* (above), there had been an element of ambiguity as to whether jurisdiction in this matter was founded on domicil or ordinary residence (cf. judgments of Bucknill and Tucker, L.JJ.). On an examination of these judgments the Divisional Court decided that they should be interpreted as basing summary jurisdiction on ordinary residence only, at the time of issue of the summons, and as in the present case the husband was resident in Scotland at that time, the English Court had no jurisdiction over him.

(Cf. Latey, p. 364.)

Adultery by husband—wife's return to husband's home as housekeeper —whether condonation—Cook v. *Cook,* [1949] 1 All E. R. 384.—A tendency has already been noted in these pages to interpret condonation and collusion in a realistic rather than a formal sense in the light of contemporary social conditions. A Divisional Court in this case has now given a judgment in accord with this tendency in holding that the mere fact that a wife returned at her husband's request to work as his housekeeper after his mistress had left him did not constitute condonation of his adulterous association. Lord Merriman, P., with a feeling for logic which must evoke sympathy, disapproved of the holding of Willmer, J., in *Wilmot* v. *Wilmot,* [1948] 2 All E. R. 123 (noted above, Vol. 13, p. 73), that reconciliation and reinstatement as a prerequisite to condonation might be unilateral.

(Latey, pp. 124–7.)

Divorce—cruelty—coitus interruptus—Walsham v. *Walsham,* [1949] 1 All E. R. 774.—Those concerned with advising in matrimonial causes may care to note that the Court (Wallington, J.) has held in this case that the practice of *coitus interruptus* on the part of the husband constituted cruelty in its effects on the wife, though adding a hardly reconcilable dictum that " Mere abstention by the husband . . . could not amount to cruelty or give to the wife any remedy, although it might injure her health . . . " (*per* Wallington, J., at p. 775).

(Latey, p. 73 ff.)

Cruelty—degree of cruelty in summary and High Court proceedings— Barker v. *Barker,* [1949] 1 All E. R. 247.—This appeal by a husband from a justice's order on the grounds of persistent cruelty and wilful refusal to maintain his wife gave to the Divisional Court (Lord Merriman, P., and Hodson, J.) the opportunity to take note of a remark of Denning, J. (as he then was), in *Perks* v. *Perks,* [1945] 2 All E. R. 491, that justices acted on a lesser degree of cruelty than the High Court, since the relief granted might be temporary only. " It is of the utmost importance ", commented Lord Merriman, P. (at p. 248), " that it should be understood beyond the slightest possibility of misapprehension that at least the same degree of cruelty is required to justify an order in the magistrate's Court as in this Division ". The learned President used the words " at least " advisedly, pointing out that while the High Court could pronounce a decree of divorce on a single act of cruelty, the prefixing of " persistent " to cruelty in the case of summary jurisdiction " necessarily implies some degree of repetition ". Subject to this difference, proof of cruelty in either Court must satisfy the well-known description of the offence contained in *Russell* v. *Russell,* [1897] A. C. 395; 66 L. J. P. 122. Accordingly, as Hodson, J., observed (at p. 250), " The existence of cruelty depends not on the magnitude but rather on the consequence of the offence, actual or apprehended ". This decision also confirms that summary proceedings may be taken on the ground of persistent cruelty, despite the fact that only one comparatively slight incident has taken place within the statutory period of six months.

(Latey, p. 73 ff.)

Practice—questions under Married Women's Property Act, 1882, *s.* 17 *—appeal from order of registrar to Judge in chambers—Bernbaum* v. *Bernbaum,* [1949] 1 All E. R. 344.—This section of the M. W. P. A., it will be recalled, deals with applications by husband or wife to settle questions of title to or possession of property in dispute between them. The Court of Appeal has now decided that the statement of practice that an appeal from a master on trial of an issue lies to a Divisional Court (as stated in the Annual Practice, 1948, p. 1118, note to Order 54, rule 22A) is incorrect. The correct procedure is to appeal from the order of the registrar to a Judge in chambers, with a further appeal to the Court of Appeal, a procedure which, as Denning, L.J., pointed out, has long been followed in the Divorce Division.

(Latey, p. 643.)

Action in negligence by husband and wife for injury to wife—wife's contributory negligence—whether affecting husband's claim for special damages, i.e., medical and housekeeping expenses—Mallett and Another v. *Dunn,* [1949] 1 All E. R. 973.—Maitland's famous aphorism on the influence of the old forms of action found vivid confirmation in this judgment of Hilbery, J. The facts were simple. Mrs. M. had recovered for three-quarters of the total assessed general damages for injuries sustained when she was struck by the defendant's car, it being held that she was guilty of contributory negligence to the extent of one quarter. It was then argued that M.'s claim for special damages incurred for medical attention to Mrs. M. and for domestic help during her treatment were equally liable to abate, being equally affected by Mrs. M.'s contributory negligence. Hilbery, J., seeking for the basis of the husband's claim as dependent on or independent of that of his wife, found it a completely distinct action at common law, founded on the action on the case for damages *per quod consortium amisit,* as is also the action for enticement. The contributory negligence of the wife in the first case, like her consent to desert the husband in the second, does not affect the basis of the husband's claim. That claim, unlike the wife's for damages for injury to her, was not extinguished at common law by her death. Nor, held Hilbery, J., is it affected by the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), since the husband is not a person claiming in respect of damage which is the result partly of his own fault.

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5. *INCOME TAX CASES*

By L. J. Stein, Barrister-at-Law

Surtax—covenant for annual payments—power to revoke or determine —Finance Act, 1938, *s.* 38 (1).—The decision of the House of Lords in *C. I. R.* v. *Wolfson* (see *The Conveyancer,* December, 1947, at p. 149, and June, 1948, at p. 313) finally clears up an important point on the construction of the words " if and so long as the terms of any settlement are such that . . . any person . . . has or may have power . . . to revoke or determine the settlement of any provision thereof " in sub-sections (1) and (2) of section 38 of the Finance Act, 1938. It has now been authoritatively established that, in construing the words " the terms of any settlement are such that . . . ", it is not permissible to look beyond the settlement itself;

" the power and the person who may exercise it must be found within the settlement ". In *Wolfson's Case* there was a covenant to make annual payments of an amount to be measured by the dividends on certain shares held by the settlor in a company controlled by him. The Crown contended that, by virtue of his control, he could prevent the payment of a dividend during the whole period for which the covenant was operative, and that this amounted to a power to revoke or determine the settlement or a provision thereof. It was, further, contended that the settlement was caught by section 38 (1) because, if the settlor could procure the co-operation of another shareholder, the two would have between them sufficient voting-power to pass a winding-up resolution, and this—it was said—amounted to a power of revocation or determination exercisable by the settlor with the consent of another person. These contentions failed *in limine* for the reason that the settlement admittedly consisted solely of the deed of covenant and that no such powers as were relied upon by the Crown were contained in the deed; they were exercisable by virtue of the constitution of the company and not by virtue of anything in the settlement. This was sufficient to dispose of the case, but Lord Morton added that the use by the settlor of his majority shareholding to prevent the payment of a dividend would, in any case, not amount to the revocation or determination of the settlement or any provision thereof; the settlement would remain in full force and the result would be merely that the amount of the annual payment would be nil.

In *Wolfson's Case* it was common ground that the settlement consisted of the deed of covenant alone and did not include the Memorandum and Articles of the company; there was no question of a composite " settlement " such as was considered in *C. I. R.* v. *Payne* (1940), 23 T. C. 610, and also, it would seem (though the report leaves the point obscure), in *C. I. R.* v. *MacAndrew* (1943), 25 T. C. 500. There is, however, some significance in Lord Simonds' allusion to cases of the *Payne* type: " I would expressly reserve the question how far such decisions can be regarded as correct after the decision of this House in *Chamberlain's Case* " (1943), 25 T. C. 317.

Income tax—covenant for tax free annual payment—rectification.—The principles governing the exercise of the Court's discretionary power to order the rectification of a deed are illustrated, in an income tax context, by the decision of Harman, J., in *Whiteside* v. *Whiteside,* [1949]1 All E. R. 755. In connection with divorce proceedings, there was discussion between solicitors to the parties as to the provision to be made by the husband for the wife. It was eventually agreed that the husband should covenant to pay £1,000 a year free of tax up to 7s. 6d. in the pound. The wife's solicitors then proceeded to draft the deed, using the formula, " such a sum as after deduction of tax at the rate of not more than 7s. 6d. in the pound shall amount to £1,000 per annum ". This was altered by the husband's solicitors to " £1,000 per annum free of British income tax up to but not exceeding 7s. 6d. in the pound ". The alteration was accepted on behalf of the wife and the deed was finally executed with a covenant in this form. After the deed had run for a year or two, the Revenue authorities took the point that, in so far as it provided for an annual payment free of tax, it was void by virtue of Rule 23 (2) of the All Schedules Rules, Income Tax Act, 1918, with the result that the deduction claimable by the husband in computing his total income for surtax purposes was substantially less than he had been led to expect. He subsequently executed a supplemental deed whereby he agreed that the covenant should be taken to be, and always to have been, a covenant to pay such an annual

sum as, after deduction of tax at a rate not exceeding 7s. 6d. in the pound, would leave £1,000. But this had, of course, no retrospective effect in relation to the husband's surtax position, and he now asked the Court to order the rectification of the deed in the same sense. This was refused on two grounds. First, the learned Judge took the view that the discretionary power to order rectification ought not to be exercised where, as between the parties to the instrument, nothing had gone wrong. The supplemental deed disposed of any question as to the future, and up to the execution of that deed the husband had, in fact, paid the wife in full what she was intended to receive. Rectification was not required for the relief of the parties or either of them; it was sought solely for the benefit of the husband in a question between himself and the Crown. Secondly, the learned Judge pointed out that the parties, through their solicitors, had deliberately selected the form of words used in the deed, after considering and rejecting the very words which the Court was now asked to insert. The contract contained in the deed was precisely the contract which the parties had agreed upon. There had been a mistake as to the legal consequences of the contract agreed upon, but that was not the kind of mistake which warranted rectification.

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6. *DEATH DUTY CASES*

Estate duty—cesser of trust for accumulation on death of settlor—income undisposed of—Accumulations Act, 1800, *s.* 1—*Finance Act,* 1894, *s.* 1.—Where, by virtue of section 164 of the Law of Property Act, 1925, a trust for the accumulation of income is brought to an end by the death of the settlor, and the income is undisposed of pending the arrival of the time appointed for the distribution of the corpus, there is a passing on the death of the settled fund (including the accumulations), and estate duty is chargeable accordingly under section 1 of the Finance Act, 1894. The decision to this effect in *Re Bourne's Settlement Trusts* (1946), 115 L. J. Ch. 152 was applied by the Court of Session (Outer House) in *Lord Advocate* v. *Smith's Trustees,* [1949] T. R. 133. The settlement under consideration provided, so far as material, for the division of the trust property into two shares. One share was to be held upon trusts for the children of X who attained a specified age. The other share was to be held upon like trusts for any child or children who might be born to Y. There were cross-remainders, and provision was made for the failure of the primary trusts. The trustees were directed to apply the whole or any part of the income of each share for the benefit of the beneficiaries, and to accumulate any surplus income as an accretion to the capital of the share. The settlor died before any beneficiary had attained the specified age. On his death, the trust for accumulation ceased to have effect by virtue of the Accumulation Act, 1800, which represents the Scottish equivalent of section 164 of the Law of Property Act. A few weeks after the death of the settlor, Y died childless, with the result that, in accordance with the provisions of the settlement, the share appropriated to his children (if any) was added to the share appropriated to the children of Y, and the income of both shares became available for the maintenance of those children. It was held that during the six weeks' interval between the death of the settlor and the death of Y, the income of Y's children's share was undisposed of and belonged to the settlor's residuary legatees. Before the death the income was being accumulated for the benefit of any child or children who might be born to Y; immediately after the death the persons beneficially interested in that income were the

residuary legatees. Hence, the share must—it was held—be considered to have changed hands on the death of the settlor, and the property representing it, including the accumulations, was chargeable with estate duty on the footing that it had passed under section 1.

Estate duty—trustees' power of advancement—hypothetical question of liability for duty on the happening of a future event—Finance Act, 1894, *s.* 8; *Administration of Justice Act,* 1933, *s.* 3; *Finance Act,* 1940, *s.* 43; *Crown Proceedings Act,* 1947, *ss.* 13, 23.—The decision in *Barnato, Joel* v. *Sanges and Others* (see *The Conveyancer,* March, 1949, at p. 236) has been affirmed by the Court of Appeal, [1949] 1 Ch. 258.

Estate duty—Irish settlement of Irish lands—proceeds of sale reinvested in England—whether situate out of Great Britain—Finance Act, 1894, *s.* 2 (2).—The decision of the Court of Appeal, affirming the judgment of Roxburgh, J., in *Re Midleton's Settlement, Cottesloe (Lord) and Cody* v. *Att.-Gen. and Midleton (Earl)* (see *The Conveyancer,* June, 1947, at p. 304, and December, 1947, at p. 149) has been affirmed by the House of Lords, [1949] L. J. R. 1024.

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7. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Rent Restriction Acts—whole house outside the Acts—house converted into flats—standard rents of flats ascertainable by apportionment—Lindop v. *Quaife,* [1949] 1 All E. R. 456, is another decision on that difficult and troublesome sub-section, section 12 (3) of the 1920 Act. It follows *Upsons, Ltd.* v. *Herne,* [1946] K. B. 591, in holding that the *rent* of a house outside the Rent Restriction Acts may be apportioned to determine the standard rents of dwelling-houses comprised in it. In *Lindop* v. *Quaife* the landlord had taken a long lease of a house which was outside the Acts by reason of its rateable value. He altered and adapted it, turning it into ten flats, of which he kept one and sub-let the others. It was held that the standard rents of the flats had to be ascertained by apportionment of the rent of the whole house. It will be noted that this case, like *Upsons, Ltd.* v. *Herne,* goes further than *Barrett* v. *Hardy Brothers,* [1925] 2 K. B. 220, which decided that the rateable value of a property which was outside the Acts could be apportioned to ascertain whether a dwelling-house comprised in that larger property came within the Acts. *Upsons, Ltd.* v. *Herne* and *Lindop* v. *Quaife* decide that the actual standard rents of the subsidiary dwelling-houses are to be determined by apportionment of the rent of the main dwelling-house, although the latter is outside the Acts. The method of arriving at the apportionment of rent is by apportioning the rateable value and applying the proportions so obtained to the rent. The Court in *Lindop* v. *Quaife* reiterated the criticism made in *Upsons, Ltd.* v. *Herne* of Scott, L.J.'s well-known dictum in *Field* v. *Gover,* [1944] K. B. 200, that both the containing and the contained dwelling-houses must be within the Acts. *Cole* v. *Harris,* [1945] K. B. 474, was distinguished on the ground

that at the material date there had been no letting of the whole house in that case.

One cannot help recalling the second thoughts of Bankes, L.J., in *Barrett* v. *Hardy Brothers,* when, referring to his own decision in *Sinclair* v. *Powell,* [1922] 1 K. B. 393, he spoke of it as a decision which endeavoured " to supply the omission [in the law] by an interpretation of the sub-section which practically ignores its actual wording ". It was too late, then, and it is much too late now, to revise this interpretation, but Scrutton, L.J., with his devastatingly critical mind, was right then, as he so often was, in thinking that the construction of the sub-section had proceeded on unfortunate lines. (Rent Restrictions Guide, 2nd ed., p. 36. The last sentence of the second paragraph on p. 36 was written before *Upsons, Ltd.* v. *Herne.*)

Rent Restriction Acts—presumption that a dwelling-house is a dwelling-house to which the Acts apply—limitation of this presumption.—Attempts are sometimes made to strain too far the meaning of section 7 (1) of the 1938 Act which provides that " If any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown ". This sub-section simply means that once the tenant establishes (and the onus is on him to establish) that premises are a " dwelling-house " within the meaning of the Acts, that house is deemed to be within the financial scope of the Acts unless the contrary is shown. There is no presumption that a person who alleges that he is a tenant and not a service occupant has paid any rent: *Ford* v. *Langford,* [1949] 1 All E. R. 483.

It must be observed that the presumption set out in section 7 (1) only arises where it is first established that the premises are a " dwelling-house " as defined by the Acts. The presumption is, therefore, of limited scope. This limitation, established in *Wright* v. *Arnold* (1946), 62 T. L. R. 751, was illustrated also in *Turner* v. *Baker,* [1949] 1 All E. R. 560 (referred to in greater detail elsewhere in these Notes), where it was held that the tenant must show that there is a " dwelling-house " within the meaning of the Acts and not merely a sharing arrangement on *Neale* v. *Del Soto* lines. (Rent Restrictions Guide, 2nd ed., p. 2.)

Rent Restriction Acts—sub-letting of part of a house furnished with a sharing arrangement between tenant and sub-tenant—house not " let as a separate dwelling "—possession of whole house recovered by landlord.—The important decision in *Turner* v. *Baker,* [1949] 1 All E. R. 560, was given while the Landlord and Tenant (Rent Control) Bill was in process of passing through Parliament. The opportunity was therefore taken of introducing a clause into the Bill (clause 9 in the latest print of the Bill available at the time of writing) which reverses the effect of the decision. The Bill is not yet (at the time of writing) an Act, so that the decision is at the moment law. Even when it ceases to be law it will be of importance for an understanding of the new Act.

In *Turner* v. *Baker* the tenant of a dwelling-house within the Rent Restriction Acts sub-let one room furnished and allowed the sub-tenant the use of the kitchen. In an action by the landlord of the whole premises to recover possession, it was held that he was entitled to possession, not merely of the part let furnished but of the whole premises. It was fairly clear from *Prout* v. *Hunter,* [1924] 2 K. B. 736, and *Barrell* v. *Fordree,* [1932]

A. C. 676, that the landlord could recover possession of the part let furnished. The importance of the decision is that, as a result of the sharing arrangement between the tenant and the sub-tenant, to which the landlord was not a party or privy, the landlord could obtain possession of the whole. The *ratio* of the decision was that the sharing of the kitchen, which a line of decisions following upon *Neale* v. *Del Soto,* [1945] K. B. 144, has decided to be "living accommodation", prevented the house, either in whole or in part, from being "let as a separate dwelling" within the Acts. The fact that the landlord was not a party to the sharing agreement was immaterial—it is here that the decision breaks new ground.

The case may be said to be yet another instance of the ambiguity of the word "let". The house was "let as a separate dwelling" to the tenant originally, but it was not "let as a separate dwelling" if this phrase is to be taken as descriptive of the facts of actual occupation at the material date, the moment when possession is sought.

The clause in the Landlord and Tenant (Rent Control) Bill above referred to provides that the Rent Restriction Acts are not to be excluded by reason only that part of the premises is sub-let furnished, or that part is sub-let with a sharing arrangement between the tenant and a sub-tenant or between two or more sub-tenants. This clause, therefore, reverses both *Barrell* v. *Fordree* and *Turner* v. *Baker.* It only applies, however, where *part,* not the whole, of the premises is sub-let. It does not, therefore, affect *Prout* v. *Hunter* itself, where the whole was sub-let furnished.

(Rent Restrictions Guide, 2nd ed., pp. 6, 20 and 70.)

[Note: The Bill received the Royal Assent on June 2, 1949.]

Rent Restriction Acts—premises let for business purposes—contemplated user, not actual user, to be considered.—In *Wolfe* v. *Hogan,* [1949] 1 All E. R. 570, the Court of Appeal approved as correct the following statement of the law contained in Megarry's *Rent Acts* (4th ed., p. 19):—

> "Where the terms of the tenancy provide for or contemplate the use of the premises for some particular purpose, that purpose is the essential factor, not the nature of the premises or the actual use made of them. Thus, if premises are let for business purposes, the tenant cannot claim that they have been converted into a dwelling-house merely because somebody lives on the premises. . . . If, however, the tenancy agreement contemplates no specified use, then the actual use at the time when possession is sought by the landlord must be considered."

In the case itself premises had been let for use as a shop, but there was no covenant that they would not be used as a dwelling-house. During the "blitz" the landlord had given the tenant permission to sleep on the premises, but there was no evidence that the landlord knew that (as was in fact the position) the tenant continued to live there regularly. The Court of Appeal held that, in the absence of evidence that the landlord had affirmatively consented to the change of user so as to create a new contract to let the premises as a dwelling-house, the user as a shop contemplated by the letting was decisive, and the landlord could recover possession. A dictum by Salter, J., in *Gidden* v. *Mills,* [1925] 2 K. B. 713, to the effect that, if there is no covenant excluding use as a dwelling-house, the actual user when possession is sought is the governing factor, was disapproved. On the other hand, the following dictum by Bankes, L.J., in *Epsom Grand Stand Association, Ltd.* v. *Clarke,* [1919] W. N. 170, 171, was criticised as incomplete: "If an agreement were to let premises as a barn, the tenant, even though he lived there, could not be heard to say that they were let as a

dwelling-house". This dictum appears to ignore the possibility that the change of user might be known to, and accepted by, the landlord, so that a contract to let as a dwelling-house might be inferred.

(Rent Restrictions Guide, 2nd ed., p. 17.)

Rent Restriction Acts—lease by mortgagor where mortgagor's statutory power of leasing excluded—lawful tenancy—tenant protected under Acts.—In *Dudley and District Benefit Building Society* v. *Emerson,* [1949] 1 All E. R. 691, Vaisey, J., had to decide the short but technical point whether the tenant of a mortgagor, in a case where the mortgage expressly excluded section 99 (1) of the Law of Property Act, 1925, and the tenancy was created subsequently to the mortgage, was protected against the mortgagee under the Rent Acts. Vaisey, J., held that the tenant was so protected, on the ground that he was "lawfully" in possession of the premises. Vaisey, J., appears to have been considerably influenced by the case of *Iron Trades Employers Insurance Association* v. *Union Land and House Investors,* [1937] Ch. 313. That was a case where mortgagors who entered into a mortgage by legal charge covenanted with the mortgagees that they would not, without the consent of the mortgagees, exercise the power of leasing conferred by the Law of Property Act, 1925, and it was held that a lease by the mortgagors without such consent was not a breach of their covenant; they were granting a lease which was binding merely between the mortgagors and the lessee, and nothing in the Law of Property Act deprived them of their right to make such a lease. That decision is intelligible enough, but it is a far cry from that to a decision that a tenancy which is not binding on the mortgagee can yet confer such a lawful possession as to protect the tenant against the mortgagee by virtue of the Rent Acts. This is an extraordinary result. The case of *Martin* v. *Watson,* [1919] 2 Ir. R. 332, cited by the editors of *Law Notes* in their book on *Rent and Mortgage Interest Restrictions* (21st ed., p. 94) as an authority for the latter proposition, is, as Vaisey, J., recognised, not a strong authority on this point.

The present case is not one of the lawfulness of a sub-letting. If it was, the provisions of section 15 (3) of the 1920 Act might be applicable and the decision would be less difficult than it is. It is submitted, with the greatest respect, that the correctness of the conclusion reached by Vaisey, J., is not beyond question, and the point may hereafter be open to further argument.

(Rent Restrictions Guide, 2nd ed., p. 69. Woodfall, 24th ed., p. 81.)

Rent Restriction Acts—section 12 (1) (*g*) *of* 1920 *Act—meaning of "member of the tenant's family"—de facto adopted daughter included.*—In *Brock* v. *Wollams,* [1949] 1 All E. R. 715, the Court of Appeal held that the *de facto* adopted daughter of a tenant was a "member of the tenant's family" within the meaning of section 12 (1) (g) of the 1920 Act (as amended). As Wright, J., said in *Price* v. *Gould* (1930), 143 L. T. 333, the word "family" is a popular, loose and flexible expression, not a technical term. In the present case Denning, L.J., expressed the view that it included not only legitimate children, but step-children, illegitimate children and adopted children. There is already authority for including a husband, brother and sister, nephew or niece by blood or marriage, and (an Irish case) grand-daughter. Bucknill, L.J., in *Brock* v. *Wollams* pointed out that the question "is not entirely one of fact, but must be a question largely of law".

(Rent Restrictions Guide, 2nd ed., p. 66.)

Rent Restriction Acts—premises let " in consequence of employment "—knowledge of tenant not material—use of words judicially interpreted in a statute—extent to which Court of Appeal bound by earlier interpretation.—So far as rent restriction law is concerned the decision of the Court of Appeal in *Royal Crown Derby Porcelain Co., Ltd.* v. *Russell,* [1949] 1 All E. R. 749, does no more than affirm the previous Court of Appeal decision in *Braithwaite & Co., Ltd.* v. *Elliott,* [1947] K. B. 177, that for the purpose of head (g) of the First Schedule to the 1933, Act, it is sufficient if the employment was the motive present in the landlord's mind in letting the dwelling-house; it is immaterial whether the tenant was aware of this motive. In affirming *Braithwaite's Case,* however, the Court of Appeal rejected an ingenious legal argument submitted for the tenant. Schedule I (g) of the 1933 Act in substance re-enacts section 5 (1) of the 1920 Act, which was the subject of judicial interpretation in *Braby (Frederick) & Co., Ltd.* v. *Bedwell,* [1926] 1 K. B. 456. In *Braby's Case* a Divisional Court held that the knowledge both of the landlord and of the tenant was required. *Braithwaite's Case* overruled *Braby's Case* on this point, but in the present case it was contended that this was wrong, because it is a principle of construction that when Parliament uses in an Act a legal term which has been judicially construed, it must be assumed that the term is used in the sense in which it was judicially construed. The re-enactment of the above provision in the 1933 Act, therefore, it was contended, gave statutory authority to the decision in *Braby's Case,* and it should not have been overruled. The Court of Appeal rejected this contention. Denning, L.J., put the matter succinctly as follows: " I do not believe that whenever Parliament re-enacts a provision of a statute it thereby gives statutory authority to every erroneous interpretation which has been put on it ".

(Rent Restrictions Guide, 2nd ed., p. 59.)

Rent Restriction Acts—landlord becoming such by purchase after December 6, 1937—landlord's widow, claiming as administratrix and personally, in no better position than landlord to recover possession.—In *Littlechild* v. *Holt,* [1949] 1 All E. R. 933, a dwelling-house subject to 1920 Act control had been bought in 1944. At all material times the house was occupied by a statutory tenant. The purchaser admittedly purchased the dwelling-house since December 6, 1937, and could not, therefore, have relied on paragraph (h) of the First Schedule to the 1933 Act as entitling him to an order for possession without proof of alternative accommodation. The purchaser started proceedings for possession but died before the day fixed for an adjourned hearing. His widow took out letters of administration and continued the proceedings. She claimed to be entitled to sue both as administratrix and in her own right as universal legatee and devisee. The Court of Appeal held that she was in no better a position to recover possession than her deceased husband. The husband was a " purchaser " and she only succeeded to such rights as he had. The case was to be distinguished from *Baker* v. *Lewis,* [1947] K. B. 186, where the plaintiff acquired the property by will from a person who was not himself a " purchaser " within the meaning of the statute.

(Rent Restrictions Guide, 2nd ed., p. 61.)

Rent Restriction Acts—1920 *Act control—preservation of decontrol by registration—unnecessary when dwelling-house not within Acts on July 17,* 1933.—In *Norton* v. *White,* [1949] 1 All E. R. 925, the question whether a

house was subject to 1920 Act control (in which case the standard rent was 14s. a week) or 1939 Act control (in which case the standard rent was 35s. a week) depended on whether the provisions of section 4 (1) of the 1938 Act requiring registration to preserve decontrol applied. The facts were that the dwelling-house was let at 14s. a week until 1930, from 1930 to 1936 it was owner-occupied, and from 1936 it was let at 35s. a week. It was contended for the tenant that as the landlord took no steps to register decontrol under section 4 (1) of the 1938 Act, the house remained subject to 1920 Act control, and the standard rent was, therefore, 14s. The Court of Appeal rejected this argument; they held (1) that the house became decontrolled in 1930 by virtue of section 2 (1) of the 1923 Act; (2) the provisions requiring registration to preserve decontrol contained in section 4 (1) of the 1938 Act only applied in the case a house let as a separate dwelling on July 17, 1933; (3) as the house was owner-occupied on July 17, 1933, it was not then let as a separate dwelling; (4) the house was, therefore, free from 1920 Act control and became subject to 1939 Act control, with the result that the standard rent was 35s.

This decision is, in principle, the same as *R. & P. Properties* v. *Baldwin*, [1939] 1 K. B. 461. In that case the owner of two flats, which had been separately let, combined them into one in 1935 and then let the combined tenement as one flat. It was held that the new tenement so created was not subject to 1920 Act control. It was not let as a separate dwelling on July 17, 1933, since at that date there were two dwellings, not one.

Rent Restriction Acts and Landlord and Tenant Act, 1927—*new lease under* 1927 *Act at a rent higher than standard rent—relationship of the two Acts.—Rose* v. *Hurst* (1949), S. J., May 14, 1949, p. 319, decided an important point in regard to the interaction of the Rent Restriction Acts and the Landlord and Tenant Act, 1927. The question was whether the rent payable under a new lease granted in pursuance of the Landlord and Tenant Act, 1927, must be restricted to the standard rent (or, where the standard rent differs from the recoverable rent, the recoverable rent) payable by virtue of the Rent Restriction Acts. The Court of Appeal held that the rent which may be fixed under the 1927 Act is not restricted to the standard or recoverable rent. The special provision in the 1927 Act, enabling the tribunal to fix such rent under the new lease as it thinks proper, overrides the general rent control provisions of the Rent Restriction Acts. The Court pointed out, in support of this conclusion, that by obtaining a new lease the tenant had greater security than he would have had by merely holding over as a statutory tenant, and acquired the power to assign, which a statutory tenant does not possess.

The principle underlying this decision is the same as that in *Roberts* v. *Jones*, [1947] K. B. 221, where it was held that such special rent control provisions as that contained in the Housing (Rural Workers) Act, 1926, excluded the general rent control provisions of the Rent Restriction Acts.

The decision in *Rose* v. *Hurst* has come as a surprise to many practitioners, and it must be admitted that it is not free from difficulties. It might be argued that if section 5 (2) of the 1927 Act had intended to exclude the Rent Restriction Acts it would have done so in express terms, as section 16 of the 1927 Act does in another connection. Again, does the rent fixed for the new lease determine the standard rent for the future, *i.e.*, after that lease expires, or is there a reverter to the standard rent prevailing before the new lease was granted? Is the rent fixed by the

tribunal a special rent, like the rent in *Roberts* v. *Jones*, or the rent fixed under Defence Regulation 68(B), which does not determine the standard rent.

(Woodfall, 24th ed., pp. 1078–1080; Rent Restrictions Guide, 2nd ed., pp. 32, 46.)

Furnished Houses (Rent Control) Act, 1946—wholesale references of flats by local authority—validity of references—ruling as to "non-contractual services".—*R.* v. *Paddington and St. Marylebone Rent Tribunal, ex p. Bell, London and Provincial Properties, Ltd.*, [1949] 1 All E. R. 720, is important both as showing the invalidity of wholesale references of lettings by a local authority to a 1946 Act rent tribunal, and because of the clearer guidance now given by the Court in regard to "non-contractual services".

After two tenants of flats in the large modern building, Park West, near Marble Arch, had succeeded in obtaining a reduction of their rents from the rent tribunal under the 1946 Act, the local authority proceeded to refer all the remaining lettings to the tribunal. The building contained 555 flats, 182 of them let furnished, 208 occupied by statutory tenants, 124 let unfurnished at controlled rents, 3 let as business premises, 1 vacant, and the remaining 37 let unfurnished but not subject to the Rent Acts. The local authority first included all the lettings in a block reference but later, recognising that this was invalid, made individual references of each of the flats. Eventually the tribunal made orders reducing the rents of eight flats. In giving their decision on these eight cases the tribunal took into account the circumstance that the flats were not up to modern standards because the ceiling was in no case more than eight feet from the floor. The tribunal had ascertained this from personal inspection but the point was not mentioned during the hearing. The Court issued an order of certiorari to quash the eight orders made by the tribunal, and an order of prohibition to prohibit the tribunal from proceeding with the applications in respect of the remaining flats.

1. The wholesale references were not a genuine exercise of the powers conferred by the Act. The local authority had referred the lettings to the tribunal regardless of the particular facts of each letting, whether the premises were furnished or unfurnished, whether subject to the Rent Acts or otherwise, whether dwelling-houses or business premises, and regardless of the wishes of the tenants themselves. The whole reference was, therefore, vitiated *ab initio*, and the invalidity of the reference affected the eight lettings upon which the tribunal had adjudicated.

2. In any case the determination in these eight cases would have to be quashed as the landlords had been given no opportunity of dealing with the allegation that the flats were not up to modern standards. On the principle of *Board of Education* v. *Rice*, [1911] A. C. 179, the tribunal's decisions could not stand.

3. The Court made it clear that, although the existence of non-contractual services could not be taken into account in deciding whether the tribunal has jurisdiction, such services can and should be taken into account, if the tribunal has jurisdiction, when considering the reasonableness of the rent. The tribunal in this case had misunderstood the decisions in *R.* v. *Hampstead and St. Pancras Rent Tribunal, ex p. Ascot Lodge, Ltd.*, [1947] K. B. 973, and *R.* v. *Paddington and St. Marylebone Rent Tribunal, ex p. Bedrock Investments, Ltd.*, [1947] K. B. 984, on this point.

Landlord and Tenant Act, 1927—*compensation for goodwill—tenant carrying on business under two successive tenancies.*—In *Lawrence* v. *Sinclair,* [1949] 1 All E. R. 418, the Court of Appeal settled a point not hitherto the subject of a judicial ruling, namely, whether a tenant can claim compensation for goodwill under section 4 (1) of the Landlord and Tenant Act, 1927, if during the qualifying period of five years mentioned in that sub-section he has held, not under one single tenancy but under two or more successive tenancies. In *Lawrence* v. *Sinclair* the tenant had taken an assignment of the residue of a long lease and on the expiry of the lease had held over as a yearly tenant for two years. The yearly tenancy was duly determined by notice to quit and within one month from the service of the notice the tenant made his claim for a new lease or compensation as required by the Act. It was argued that the section required that the tenant should hold under one and the same tenancy during the five-year period, but the Court rejected this contention, which meant reading into the statute a limitation which was not there. It is worth noting that if the tenant had quitted at the end of the long lease, and had not held over, he could not have claimed, since he had not given notice twelve months before the expiration of the term. The holding-over, by creating a new periodical tenancy, determinable by notice, gave him another chance to formulate his claim, which could now be made within one month from the service of the notice. Counsel for the landlord made some play with this, but the Court held that it had no weight against the plain words of the Act.

Two points are perhaps worth mentioning. First, although this case decides that there may be a change in the tenant's title during the five years, there must be no break in *time*; the period must be continuous. Secondly, although there may be a change in the tenant's title there is no warrant for supposing that a title other than as *tenant* will do; there must have been a tenancy of some kind during the whole of the five-year period.

(Woodfall, 24th ed., pp. 1075–1078.)

Landlord and Tenant Act, 1927—*mixed business and professional activities—goodwill attributable to professional activities not the relevant goodwill required by the Act—solicitors acting as agents for insurance companies and building societies.*—The decision of the Court of Appeal in *Stuchbery & Son* v. *General Accident, Fire and Life Assurance Corporation, Ltd.,* [1949] 1 All E. R. 1026, establishes the proposition that where a claim is made for compensation for goodwill or a new lease in lieu thereof under the Landlord and Tenant Act, 1927, and it is shown that the tenant has been carrying on a mixture of business and professional activities within the meaning of section 17 of the Act, the only relevant goodwill for the purposes of the Act is the goodwill attributable to the trade or business, to the exclusion of the goodwill, if any, attributable to the profession. In *Stuchbery's Case* the tenants were solicitors who, in addition to their ordinary professional practice, acted as agents for insurance companies and building societies. They claimed under sections 5 (1) and 4 (1) of the 1927 Act the grant of a new lease, or alternatively, compensation for goodwill. There was no evidence of any goodwill attributable to the work on behalf of insurance companies and building societies. The Court did not decide that such work constituted a "trade or business", but, assuming in the tenants' favour that it did, held that, as there was no evidence of any goodwill adhering to the premises by reason of such work, the tenants' claim failed. They thus rejected the tenants' contention that once it has been found that the activities carried on *include* a trade or business as well as a profession, it is enough to show that goodwill has become attached to the

premises by reason of any of those activities, even if it is referable to the professional part of them. One cannot help feeling that the short and pithy judgment of Denning, L.J., in this case is perhaps a better measure of the merits of the tenants' argument than the Master of the Rolls' elaborate analysis. Denning, L.J.'s judgment is a masterpiece of compression; in its compact logic the rejected contention is revealed as plainly contrary to section 4 and section 17.

(Woodfall, 24th ed., pp. 1075–1080.)

Tenancy by estoppel—transmission of rights under doctrine of estoppel to personal representative—Conversion of right to rely on estoppel into tenancy.—Some old learning was applied in a novel setting in the case of *Mackley* v. *Nutting,* [1949] 1 All E. R. 413. The facts were that the tenant of a dwelling-house within the Rent Restriction Acts died intestate and his tenancy accordingly vested in the President of the Probate, Divorce and Admiralty Division as a result of section 9 of the Administration of Estates Act, 1925. His widow continued to reside in the house and paid rent to the landlords for a number of years until she in turn died intestate. It was found as a fact that it was intended by both the landlords and the widow that a tenancy should be created on the original tenant's death on the same terms as those under which he had held. On the widow's death her daughter, who had at all times lived with her parents, remained in possession, and she eventually took out letters of administration to her mother's estate. Subsequently to the grant of administration the landlords served notice on the President purporting to terminate the tenancy which had become vested in him on the original tenant's death. They then claimed possession from the daughter. The County Court Judge held that the widow's rights had been those given by section 12 (1) (g) of the 1920 Rent Act and that, as such rights could only be transmitted once, the daughter had no right to remain in possession. The County Court Judge (who decided the case in July, 1947) had not had the advantage of the guidance given by *Thynne* v. *Salmon,* [1948] 1 K. B. 482, and *Smith* v. *Mather,* [1948] 2 K. B. 212 (discussed in these Notes for June, 1948, p. 314), and his decision was clearly wrong; the original tenant had been a contractual tenant at the date of his death, and there was no question of section 12 (1) (g) applying.

The Court of Appeal held that the landlords were not entitled to possession as against the daughter, on the following grounds: (1) the landlords had intended to grant a tenancy to the widow, but owing to the fact that the tenancy belonging to the deceased had vested in the probate Judge they were unable to do so. They were, however, estopped from denying as between themselves and the widow that a tenancy had been created. To use an inaccurate but intelligible expression, there was a "tenancy by estoppel"; (2) the right to rely on the estoppel passed to the daughter as her mother's personal representative; (3) when the interest of the probate Judge was determined by the notice to quit, what had been a mere right to rely on the doctrine of estoppel was converted into a tenancy, since the impediment which had prevented an effective grant of a tenancy to the widow was now removed. This latter rule, which has that curious flavour of legal legerdemain which characterises some of the old learning, was well expressed in the passage from Tindal, C.J., in *Webb* v. *Austin* (1844), 7 Man. & G. 701, 724, cited with approval by the Court of Appeal in the present case:—

> "The doctrine on this subject, as it has been generally understood by the profession, may be collected from Mr. Preston's *Treatise on*

Abstracts, Vol. 2, p. 210, and the authorities there cited. That general understanding appears to be, that ' an indenture of lease, or a fine *sur concessit,* for years, will be an estoppel only during the term. It first operates by way of estoppel, and finally, when the grantor obtains an ownership, it attaches on the seisin and creates an interest, or produces the relation of landlord and tenant; and there is a term *commencing* by estoppel, but *for all purposes* it becomes an estate or interest. It binds the estate of the lessor, etc., and therefore continues in force against the lessor, his heirs, etc. It also binds the assigns of the lessor and of the lessee.' "

(Woodfall, 24th ed., pp. 13–17.)

Notice to quit—" waiver "—acceptance of rent after expiration of notice —Hartell v. *Blackler overruled.*—In *Clarke* v. *Grant,* [1949] 1 All E. R. 768, the Court of Appeal expressly overruled *Hartell* v. *Blackler,* [1920] 2 K. B. 161, which had been dissented from in a case decided in the same year, *Davies* v. *Bristow,* [1920] 3 K. B. 428. In *Clarke* v. *Grant* a yearly tenant of a dwelling-house at a rent payable monthly in advance was given a valid notice to quit expiring on April 30, 1948. Early in May (*i.e.,* after the notice to quit had expired) the tenant paid a month's rent to the landlord's agent, who accepted it, thinking mistakenly that it was rent payable in arrear in respect of April. The County Court Judge held that the notice to quit had been waived. The Court of Appeal reversed this decision. They pointed out that the County Court Judge had confused acceptance of rent after notice to quit with acceptance of rent after notice of an act of forfeiture. In the case of forfeiture the lease is voidable and the acceptance of rent in that case has been held to be an act which acknowledges the continuance of the tenancy and thus operates as a waiver of the forfeiture. But after the expiry of a notice to quit the tenancy is at an end, and the landlord can no more " waive " the notice than he can waive the effluxion of time. The acceptance of rent after a tenancy has come to an end may, of course, be evidence of the creation of a new tenancy, but there was no evidence in the present case from which this could be inferred. The Court unequivocally overruled *Hartell* v. *Blackler* as an authority for the doctrine that acceptance of rent after notice to quit may operate as a " waiver " of the notice. This heresy should now be finally banished from the law of landlord and tenant.

(Woodfall, 24th ed., pp. 974 and 980.)

Small Tenements Recovery Act, 1838*—failure of landlord to serve notice on occupier a fatal defect—but occupier's action against landlord for trespass fails—procedural and substantive provisions.—Lewis* v. *Gunter-Jones* (1949), 65 T. L. R. 181, illustrates in an interesting way the distinction between the procedural provisions of section 1 of the Small Tenements Recovery Act, 1838, and the substantive nature of the provisions of section 3. A landlord had failed to serve the notice required by section 1 on an occupier, but obtained a warrant for possession. The warrant was executed and the occupier brought an action for trespass against the landlord under section 3, on the ground that at the time the warrant was granted the landlord had not a lawful right to possession because of the want of notice which invalidated the section 1 proceedings. It was held (1) that the section 1 proceedings were invalid, the failure to give notice to the occupier being a fatal flaw which vitiated them, but (2) an action under

section 3 determined substantive rights, not matters of procedure. When the substance was considered the occupier was a mere licensee whose licence had been determined—in other words, a trespasser. The landlord had, therefore, a lawful right to possession, and the occupier's claim under section 3 accordingly failed.

(Woodfall, 24th ed., pp. 1116–1119.)

THE LIBRARY

Title to Land. By W. J. Williams, B.A., of Lincoln's Inn, Barrister-at-Law, Conveyancing Editor of the *Encyclopædia of Forms and Precedents* (Third Edition). London: Butterworth & Co. cxxxvi and 632 and (index) 83 pp. (£3 12s. 6d.)

A really new book on title to land is something of an event for conveyancers. This book, according to the author's preface, "is intended to be one which the practical conveyancer can keep on his desk, and in which he will find the solution to the problems with which he will meet in the course of his work so far as that work concerns the sale of land. In speaking of the practical conveyancer the author has had in mind the conveyancing clerk or the solicitor who does his own conveyancing work, and there is nothing which cannot be followed by anyone having but a nodding acquaintance with the technicalities of conveyancing. That is not to say that the work deals with purely elementary matters or is a mere outline of the subject. The work contains in its pages all that the conveyancer will want to know except possibly in a few rare cases, and there is not only a clear statement of what he wants to know but all the authorities in support of the propositions are cited".

To one who has devoted a large part of his life to the study of the land law and conveyancing this is a very large claim and not made less by the fact that this massive learning is compressed into 632 pages. It emphasises the herculean labour that must have gone to the making of the book which is in effect what we should normally expect to appear under the title of Vendor and Purchaser, and includes registered as well as unregistered conveyancing. The compression is due essentially to the fact that the statements of law are given with an economy of language in itself remarkable, but they are supported by footnotes which make the length of the work deceptive. The Table of Cases, a hundred pages long, gives a more adequate conception of the mass of information compressed within these covers (though the Table of Cases in *Williams' Vendor and Purchaser* is rather more than half as long again). It is inevitably rare for the facts of these cases or extracts from judgments to appear, and the book has all the apparatus usual in Messrs. Butterworth's publications of reference to the *English and Empire Digest*, *Halsbury's Statutes* and Halsbury's *Laws of England*. In fact, the style is very reminiscent of the concentrated statements of the law appearing in *Halsbury*, but achieves a greater simplicity in its sentences, though single paragraphs extending over two or more pages do nothing to enhance the literary style. This is probably irrelevant because we think the book is intended primarily for reference and not to be read as a whole.

In such a work the arrangement is largely a question of taste and no two authors could expect to adopt the same method. Here the primary questions of title, such as settled land, are dealt with under capacity of the parties while the other chapters deal more particularly with the transactions involved in sale, including a somewhat comprehensive chapter entitled "The Vendor's Title" which includes such matters as the contents of a deed, requisitions and searches. An adequate Index, however, makes arrangement a matter purely of convenience of treatment to avoid undue cross reference and this seems to have been achieved.

For those who require a clear statement of rules supported by authority this is a very useful book. To our way of thinking it has two defects, one of which

arises from the learned author's aim as already set out. The first is increasingly common in textbooks on conveyancing and that is neglect of the pre-1926 rules. From the point of view of title these rules are just as important as those effected by the 1925 Legislation. Indeed we think they are more important, because they are less commonly known. It was interesting to see two cases in a matter of days in which the whole problem was, in fact, solved by the Statute of Uses, and the application of which had been completely overlooked by the solicitors concerned. This applies just as much, we think, to the problems of the Settled Land Acts, 1882–90. Although the Statute of Uses is not mentioned in the Table of Statutes or the General Index its abolition is referred to on p. 467, but otherwise it is practically disregarded. The Settled Land Act, 1882, receives slightly less cavalier treatment, but we think that it would not be easy to check a pre-1926 settled title from this book where any difficulty arose.

The second defect is the self-sufficiency of the learned author. We would respectfully suggest that there are many matters on which doubts can legitimately be held. We, for example, have some doubt whether *Re Wallis & Grout's Cont.* would today be preferred to *Bolton* v. *London School Board,* since the latter case has in practice been largely acted upon in accepting a twenty-year title beginning with a conveyance containing a recital of seisin. The learned author, however, does not suggest that there is any doubt. This is a small matter, but there are larger issues, such, for example, as the protection afforded by a vesting deed, but the user of this book receives no hint of this. For this reason we would say that purchasers of this work should also purchase others. *Emmet on Title,* for example, is in marked contrast on this point, though the other defect we have mentioned appears there too.

Perhaps the real fact is that however useful single-volume works on title to land may be—and they can be very useful—they will be pitfalls if they attempt or pretend to be exhaustive. The range of law involved in titles to land is too vast and too complicated for inclusion in a single volume.

We ought to remark that this volume was issued too early to contain the Town and Country Planning Act, 1947. We regard this as a pity and hope to benefit by the learned author's views on this aspect of titles at an early date.

Executorships and Trusts. J. H. PHILLIPS and G. E. M. JENKINS. Second ed. (1948) by G. E. M. JENKINS, LL.B. xxvi and 404 pp. Isaac Pitman & Sons. (30s.)

This book is intended for students for the examinations of the Institute of Bankers but the lucidity of its explanations makes it useful for the law student and even the legal practitioner. The learned editor has not hesitated to indicate the possible solutions of some as yet unresolved problems. The approach is thoroughly contemporary and the information on professional practise is a valuable supplement to strict rules of law. Modern phenomena which come in for treatment include charging clauses, unit trusts, and tax-free annuities, subjects which are often neglected in works of this size. The position of the creditors of a testator's business is very well set out, as also the problem of the availability of income for the maintenance of infants. Some highly technical subjects such as charitable trusts are wisely left in outline. In order to maintain the very high standard of usefulness of this work the following suggestions might be made. The treatment of the problems of the order of application of assets in payment of debts might be expanded (p. 113). *Re Rowe,* [1941] 2 All E. R. 330 is referred to (p. 12) but the main point is not emphasised. *Re Diplock,* [1948] Ch. 465 must be referred to in later editions. Since the learned editor has gone beyond the bare letter of the law on so many other points he might also insert a caution (p. 48) as to whether section 33 of the Wills Act, 1837 deems a child to have survived a parent for any purpose other than the prevention of lapse. Thanks to the reversal of *Re Wellsted,* [1948] 2 All E. R. 209, the Addendum to this edition now becomes unnecessary.

Current Law Guides:

No. 2. Town and Country Planning Act, 1947. Second edition. By R. L. Doble, M.A., Solicitor, Deputy Town Clerk of Marylebone, and H. Mann. M.B.E., LL.B., Senior Assistant Solicitor to the Royal Borough of Kensington. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1948. (6s 6d.)

This is a "desk book". It is clear and concise. It gives easy reference to the actual authority and it pursues a very orderly course. It is much more than an outline, it is the handiest reference we know.

No. 6. Compulsory Purchase and Compensation. By R. D. Stewart-Brown, Barrister-at-Law. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1948. (6s. 6d.)

Whether property lawyers like it or not they are going to be faced with compulsory acquisition on a hitherto unprecedented scale. Furthermore, the landowner, speaking generally, is not going to find it the financially profitable proposition that it was. There will not be the margin to provide too many fees for valuers and lawyers. It, therefore, behoves the lawyer to do all he can to save his client other professional charges; and tedious and even distasteful as this topic is to any but the expert the property lawyer will have to learn his way about. This is not a long "guide", but it is clear and straightforward and provides a ready way to the authorities and combines the rather miscellaneous statutory provisions in a most useful way. Again it is a "desk book", but it can also be read by those not already familiar with the topic so as to get a manageable equipment of the rules.

Stroud's Judicial Dictionary Supplement. 1930–1946. By John Burke, of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1947. (£3 3s.)

In our opinion "Stroud" is the best and most reasonably exhaustive of the works dealing with the construction of words and phrases. A supplement to bring it down to date issued under the editorship of the General Editor of *Current Law* is very much to be welcomed. This supplement is much easier to follow than the original work and we would be glad indeed to see a new edition of the whole work on the same lines though manifestly it would be a great undertaking. It should be pointed out that the supplement covers not only case law but also relevant statutes and statutory rules and orders. It is cumulative to the extent that it refers to every heading in the main work or supplements, but only incorporates the new matter.

The Conflict of Laws. By Professor R. H. Graveson. London. 1948. Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. xxxii and 394 pp. (30s.)

Professor Graveson's introduction to the principles of the Conflict of Laws is a work of outstanding merit, though intended, primarily, as a textbook for students it will also appeal to busy practitioners who seek for quickly obtained and reliable references to the main rules of this somewhat complicated and difficult subject. The Conflict of Laws is a branch of English law which is often very bewildering to students because it is concerned to a considerable extent with problems which are interwoven with rules of foreign law and because it constantly gives rise to problems which have not come before the Courts for solution. It has also proved to be a breeding ground for a variety of abstract theories such as the Doctrine of Renvoi and the Theory of Classification or Qualification. In these circumstances

there is a tendency for writers to confuse the law as it is with the law as it should be (or with what a particular legal author may think it ought to be), and also to devote excessive attention to questions of pure theory, Professor Graveson has been very successful in avoiding these pitfalls. Questions which are in doubt are treated as such and the author's personal opinions are put in their proper perspective. The balance between scholarly presentation and practical efficiency which this book affords is deserving of the highest praise. The accuracy of the references and citations so far as we have tested them leaves nothing to be desired.

There are certain features of this work which might, perhaps, be reconsidered when a subsequent edition becomes necessary. With all due respect to the learned author, Chapter II, dealing with the problem of "Classification" and Chapter III which is concerned with "Renvoi" would, in our opinion, have been better placed at the end of a book intended for the use of students. It is by no means certain how far or in what form these abstract questions enter into the general scheme of the English rules of Private International Law. In our view they cannot be treated as theories which lie at the root of the English rules, though this is a question which cannot be discussed within the narrow compass of a book review. In any event, these chapters will be heavy going for the average student who is at the commencement of his studies in this subject. Theoretical topics of this kind are, in our view, best postponed till the student knows his way through the general structure of our system of the rules of Conflict. Admittedly, this may cause some difficulty to the teacher but this can be overcome if a policy is adopted of the reservation of such questions to the final stages of a course of instruction. Any embarrassment caused by having to consider the rules of Conflict in general without reference to "Renvoi", for instance, is, at least, equalled by the difficulty of explaining a doctrine of this kind to a student who has no knowledge of the questions of law to which the doctrine is to be applied. However, all this is a matter of opinion and Professor Graveson cannot be blamed for following a course adopted by the great majority of writers on this subject. A feature of this book which does not appear to be beyond criticism, is the Glossary of Latin terms. Is this really necessary? If the answer is in the affirmative then the glossary would appear to be inadequate. We are not, for instance, given the meaning of the terms *propositus* or *lex loci celebrationis*. The discussion of the *Vita Food Case* (at p. 148) is also open to comment in so far as it assumes that this case represents the last word on the question of the right of the parties to choose a system of law unconnected with a contract. But these observations are—as has just been observed—matters of opinion and must not be treated as detracting to any serious extent from the value of a book which provides the student with exactly what is needed and is at the same time readable and thoroughly up to date. Professor Graveson writes with knowledge and restraint. In short; this is a book which can be recommended with confidence to all those who are approaching the study of the rules of the Conflict of Laws for the first time.

H. C. GUTTERIDGE.

The Rent Acts. By R. E. MEGARRY, M.A., LL.B., Barrister-at-Law. Fourth edition. London: Stevens & Sons, Ltd. xlvii and 293 pp. 1948. (21s.)

Members of the profession are indeed fortunate in having their path through the jungle of the Rent Restrictions Acts made easier by two books of high but diverse merit. Blundell's *Rent Restrictions Guide* and Megarry's *Rent Acts*. Each is excellent in its way. Comparisons are odious, and there is no need to say more than that, if Blundell's arrangement is the simpler and clearer for the ordinary practitioner and especially the beginner, Megarry is probably the more rewarding for the seeker after the severely logical exposition of principle.

Megarry's *Rent Acts* is illuminated throughout by that insight which can only come from a thorough mastery of the Acts and their judicial interpretation. The case law is exhaustively but not obstrusively dealt with. The footnotes are copious and require careful study.

The difficulties of legal authorship in these days of non-stop legislation are illustrated by the fact that the Landlord and Tenant (Rent Control) Bill was introduced as this book was going through the press. The author has dealt with

this Bill in an Addendum. The wisdom of this course is rather open to question since the Bill is obviously going to be extensively amended before it is passed into law. The description of the clauses of the Bill in its original form may well be misleading to some readers, and the value of the Addendum is in any case lessened by the fact that the author has not had time to comment critically on the Bill's obscurities.

It would have been interesting, in view of the Landlord and Tenant (Rent Control) Bill, if the author had expressed a view on the legal position before the Bill when a premium was charged on a first letting of a dwelling-house within the Rent Acts limits. The Ridley Committee in their 1945 Report recommended (para. 140) that section 12 (2) of the 1920 Act should be amended to make it clear that "dwelling-house" included a house about to be let, so that there should be no doubt that it was an offence to charge a premium in respect of the letting of such a house.

The author has, with his usual clarity, examined the interesting series of recent decisions on the rights of tenants in relation to houses rebuilt after destruction by war damage. He is surely right in thinking that a statutory, as distinct from a contractual, tenancy perishes with the dwelling-house. Points of some interest not yet fully explored arise in connection with the standard rents of dwelling-houses rebuilt, in different circumstances, upon the sites of destroyed dwelling-houses.

There is a small misprint on p. 137. In the tenth line of the third paragraph "under" should apparently be "let".

J. Muir Watt.

Modern Law Review. Vol. 11, No. 4, and Vol. 12, No. 1.

These two numbers contain three matters of special interest to conveyancers. "Some Comparative Aspects of the Law of Landlord and Tenant", by E. J. Cohn, Vol. 11 at p. 377. This is not merely an essay in comparative law, for which many practitioners might find too little time, but an analysis of certain defects of English law in comparison with Continental law with a view to English reform. It deals with such problems as the duty to make repairs and the obligation to pay rent for premises which have been destroyed. Where proposals for reform are before the profession the law in other systems is peculiarly relevant. This should be read by all. Secondly there is "Planning and Development under the Town and Country Planning Act, 1947", by R. C. Fitzgerald, Vol. 11 at p. 401. This is something more than a bird's-eye view of the effect of the Act and some of its more important Orders. It is an analysis of the socio-legal background on which the Act should work. Practitioners tied to immediate problems of the specific rules may sometimes feel that there is no time for reason and that the whole is irrational and obstructive detail. We have every sympathy with this view, but we recommend them to read Mr. Fitzgerald. The third matter is a review (Vol. 12, p. 139) by Mr. Hargreaves of the "Principles of Land Law under the Land Registration Act", in which the learned reviewer challenges the general principles adumbrated in the book. This review raises fundamental issues and without saying that we agree with the Reviewer's ideas we can say that the matter is one for the attention of all conveyancers. It is, perhaps, unfortunate that the views were not expressed at length in article form. Finally, we can only comment that although this *Review* has been sent to us to review, nevertheless in the analysis of Recent Periodical Literature under the Law of Property no mention is made of this Journal or its articles. We are left wondering why we should be asked to review the periodical.

Law Quarterly Review. Vol. 65, No. 1.

In this number of the *Review* is one of the most important articles, both theoretically and practically, of recent years. Lord Justice Denning analyses the circumstances in which money belonging to one person but in the hands of another can be recovered from a transferee. The immediate occasion is the decision in *Re Diplock*, [1948] Ch. 465, but his Lordship does not deal with this problem based on cases connected with the distribution of deceased's estate. His purpose is to analyse

the rules of law and equity which generally govern this question and he shows that while originally they markedly differed, the dual administration of law and equity has brought them closer and closer. The article closes with a quotation from his Lordship's judgment in *Nelson* v. *Larholt,* [1948] 1 K. B. at p. 342, from which we quote the last sentence: "If it (a man's property) is taken from the rightful owner, or, indeed, from the beneficial owner, without his authority, he can recover the money from any person into whose hands it can be traced, unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority".

Another article of less practical interest but closely touching the land law is "The Greenwich Tenures of the Reign of Edward VI", by J. Hurstfield. These tenures acquired a special importance because of their use in grants of colonial land, but they also considerably affected grants of ecclesiastical lands in the mid-sixteenth century. It has in a way an immediate interest because the popularity of these tenures derived from their freedom from certain feudal incidents and in particular of wardship where the tenants held *in capite.* It was the risk of heavy capital payments. With the return of these capital payments in the form of "development charges" we *may* find conveyancers seeking a way of escape, if indeed one is to be found.

One Hundred Questions and Answers on the Town and Country Planning Act, 1947. By DEREK WALKER-SMITH, M.P., of the Middle Temple and North Eastern Circuit, Barrister-at-Law. (9s. 6d.) *Ready Reference Summary of the Rules for Calculation of Development Value and Third Schedule Tolerances.* Compiled by EDWIN ROBINSON, B.Sc., Dip. T.P., F.R.I.C.S., F.A.I., Chartered Surveyor. London: The Estates Gazette, Ltd. (2s. 6d.)

These are both quick reference works. As such they are very well got up, though in both cases the actual size and shape do not fit a lawyer's office where, in fact, practically all books are of two standard sizes. But they are not intended for shelves—they would lie easily in a drawer ready to hand. Neither of them can be called conveyancing works. Mr. Walker-Smith's pamphlet is a most handy analysis of the Act and Statutory Instruments regarded from the angle of the relation between landowner and planning authority. It summarises in a clear and concise form, and is an easy method of looking up any straightforward point. Mr. Robinson's summary is much more complicated in form, but even more laconic in statement. Once one has used it it should be a valuable *aide memoire.*

Town and Country Planning Law. By J. KEKWICK AND R. S. W. POLLARD. Second edition. London: Stevens & Sons, Ltd. 1948. (4s.)

One of the series *This is the Law,* this is a short clear statement for the layman. Practitioners who have clients who want to know about Town Planning should recommend this book to them.